SUPREME COURT OF THE UNITED STATES.

No. 261.

HENRY M. BENNETT, PLAINTIFF IN ERROR,

vs.

ALEXANDER HUNTER.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

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To the Hon. R. C. L. Moncure, judge of the Supreme Court of Appeals of the State of Virginia:

The petition of Henry M. Bennett respectfully represents, that he is aggrieved by a final judgment of the District Court of Appeals for the fourth district of Virginia, rendered at the July term thereof, of the year 1867, held at Fredricksburg, in an action wherein your petitioner was appellant and Alexander Hunter was appellee. A transcript of the record is herewith presented, by which it appears that the subject matter in controversy exceeds one thousand dollars in value, and that the said District Court of Appeals, at the time at which the case was decided, entered of record that it involved questions of such novelty and difficulty as to make it proper that it should be finally determined in the Court of Appeal.

Your petitioner assigns as errors—

First. That the judgment of the court is not warranted by the facts found by the special verdict.

Second. The errors complained of in the petition, for a supersedeas from the District Court to the Circuit Court wherein the cause was first tried. For the said errors your petitioner prays a writ of supersedeas to the judgment aforesaid.

HENRY M. BENNETT.
By W. WILLOUGHBY, *Att'y.*

Supersedeas awarded.

Bond with surety to be given in the penalty of two hundred dollars, with condition as the law directs.

R. C. L. MONCURE.

To the clerk of the Supreme Court of Appeals, Richmond.
July 19th, 1867.

VIRGINIA:

Pleas at the court-house in the town of Fredericksburg, before the District Court for the fourth judicial district, on Friday, the 12th day of July, 1867.

Be it remembered, that heretofore, to wit, on the fourth day of April, 1867, was issued out of the said District Court a writ of supersedeas, with, together with the return thereon, is in these words:

The Commonwealth of Virginia to the sheriff of Alexandria county, greeting:

We command you, that from all further proceedings on a judgment of the Circuit Court of Alexandria county, rendered at a special term of the said court, on the 25th day of February, 1867, in an action of unlawful detainer, depending in the said court between Alexander Hunter, plaintiff, and Henry M. Bennett, defendant, you altogether supersede, which judgment before the judges

of our District Court of the fourth judicial district, at the court-house in the town of Fredericksburg, for cause of error in the same, to be corrected in the petition of the said Henry M. Bennett, we have caused to come. We also command you that you give notice to the said Alexander Hunter, that he be before the judges of our District Court, at the court-house aforesaid, on the first day of July court next, then and there to have a rehearing of the whole matter in the judgment aforesaid contained, and have then there this writ.

Witness, John James Chew, clerk of our said District Court at Fredericksburg, this 4th day of April, 1867, and in the 91st year of the Commonwealth.

J. J. CHEW, *C. C.*

6 Memo: The above writ of supersedeas is not to be effectual until the petitioner shall enter into bond, with sufficient security, in the clerk's office of the said Circuit Court of Alexandria county, in the penalty of two hundred dollars, conditioned as the law directs, and a certificate of the execution thereof, with the names of the security, shall be endorsed hereon by the clerk of the said court.

Test: J. J. CHEW, *C. C.*

CLERK'S OFFICE, CIRCUIT COURT OF ALEXANDRIA COUNTY,
April 13*th*, 1867.

Henry M. Bennett, the within named petitioner, has this day filed in this office a supersedeas bond, with Josiah Millard as security, in the penalty of two hundred dollars, conditioned as the law directs.

Test: JEFF. TACEY, *Clerk.*

7 Return endorsed on writ.

Service acknowledged.
April 10th, 1867.

S. FERGUSON BEACH,
Attorney for Def'ts.

The following is a copy of the petition for the supersedeas order in vacation, of a judge of this court awarding the same, and of the record of the Circuit Court of Alexandria county:

8 District Court of Appeals of Virginia.—District IV.

BENNETT *vs.* HUNTER.

To the honorable R. C. L. Moncure, judge of the District Court of Appeals, for the fourth district of Virginia:

The petition of Henry M. Bennett respectfully represents, that he is aggrieved by a final judgment of the Circuit Court of the ninth judicial circuit, sitting in Alexandria county, rendered at the special term thereof, held in February, 1867, in an action wherein Alexander Hunter was plaintiff, and your petitioner was defendant.

A transcript of the record is herewith presented.

Your petitioner assigns the following errors in the said judgment:

1st. The court erred in denying the motion to remove the cause to the United States Circuit Court. The defendant justifies the detention alleged to be wrongful by the plaintiff, under color of an act of Congress. The act of Congress of March 3rd, 1863, known as the act in relation to the writ of habeas corpus, section 5, and the amendments thereto. provide, that in any suit or prosecution, civil or criminal, commenced in any State court against any person for any trespass or wrong done or omitted to be done during the rebellion, under color of any authority derived from any act of Congress, such removal shall be made upon motion properly made.

2nd. The judgment of the court is not warranted by the facts by the special verdict.

The defendant claims a right to the possession of the property through a lease from one L. E. Chittenden, who purchased the premises from the United States, at a sale by the United States tax commissioners, under the act of Congress of 1862, and amendments thereto, in relation to the collection of taxes in insurrectionary districts, as shown by the certificate of sale mentioned in the special verdict.

By that act this certificate of sale is prima facie evidence
9 of the regularity and validity of the sale and of the title of the defendant, and is conclusive evidence of such regularity and validity, except as to three particulars, to wit: as to whether the property was subject to taxes. or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act. It is not pretended that the property was not subject to taxes.

It is claimed by the plaintiff, that a tender of the taxes to the commissioners before the day of sale by a tenant of the owner of said land was sufficient to have prevented such sale, and that such sale was irregular on that account. But the law directs that such sales shall be made unless the tender of payment is made by the owner in person. No other person can make such payment before the sale.

The plaintiff also claims that he has complied sufficiently with the terms of redemption. To this we say:

First. He was not the owner at the time of sale. He had no vested interest, but a contingent interest, liable to be defeated by his death before the age of twenty-one years. He therefore comes within the provision (if he comes at all) of the clause which provides for the person having an interest who must be loyal, &c., and to take the required oath.

The act has made a plain distinction between the owner and one having an interest, and if he comes in the latter class, as we contend he does, he must comply with the requirements prescribed for that class, which he has not done.

Second. The application was not made by his guardian, trustee, or other person having charge of his estate, as prescribed by law.

Third. He was not a minor at the time of making the application, and had not been for nearly a year.

Fourth. He declined to take the oath required by the act of March 3rd, 1865, which prescribes that no person can redeem property sold at such tax sales without taking the oath therein provided.

It is claimed by the plaintiff that the tax commissioners had no authority to sell only a sufficient amount to pay the taxes, penalty and costs.

In answer to this, the defendant says:

First. That the plaintiff is concluded from making any inquiry upon the subject.

This not being one of the reasons for which the certificate of such sale can be impeached as evidence of the validity of the sale.

Second. That if such inquiry can be made, the law prescribes that the property subject to taxation becomes forfeited to the United States on non-payment of taxes, and shall be sold. It provides, that if it does not bring more than two-thirds of its assessed value the commissioners may bid it in for the use of the government. It also provides what shall be done with the money arising from such sales, over and above what is sufficient to pay the taxes, penalty, and costs. The commissioners therefore did not exceed their authority in selling the whole of the land which had previously become forfeited to the United States.

For the said errors, your petitioner prays a writ of supersedeas to the judgment aforesaid.

HENRY M. BENNETT.
W. WILLOUGHBY, *Att'y.*

I, Westie Willoughby, an attorney practising in the District Court of Appeals for the fourth district of Virginia, do certify, that in my opinion there is sufficient matter for reversing the judgment complained of in the foregoing petition.

W. WILLOUGHBY.

Supersedeas awarded.

Bond with surety to be given in the penalty of two hundred dollars, conditioned as the law directs.

April 3rd, 1867.

R. C. L. MONCURE.

To the clerk of the District Court held at Fredericksburg.

VIRGINIA:

Pleas at the court-house in the county of Alexandria, before the judge of the Circuit Court for said county, on Monday, the 25th day of February, 1867.

Title.

Be it remembered, that heretofore, to wit, on the 26th day of October, in the year 1866, came Alexander Hunter, by his attorney, and sued out of the office of the said Circuit Court a summons against H. M. Bennett, which summons is in the words and figures following:

Summons.

The Commonwealth of Virginia, to the sheriff of Alexandria county, greeting:

We command you to summon H. M. Bennett to appear before our Circuit Court of Alexandria county, at the court-house of said county, on the 12th day of November, 1866, that day being the first day of the November term, 1866, of said court, to answer Alexander Hunter, of a plea that he is in possession of, and unlawfully withholds from him, a farm in Alexandria county, called "Abingdon," containing about four hundred and thirty acres, situated on the Potomac river, and bounded on the east by the Potomac; on the north by the lands of Scott, King, and others; on the west by lands of Addison, Frazier, and others; and on the south by four-mile run, and land now or late Tochman's, and have then there this writ.

Witness Jefferson Tacey, clerk of our said Circuit Court, at the court-house aforesaid, this 26th day of October, 1866, and in the 91st yea rof the Commonwealth.

JEFFERSON TACEY.

[Rev. stp., 50 cts.]

And at another day, to wit, at a Circuit Court held for said county of Alexandria, on the 12th day of November, 1866, came the plaintiff, by his attorney, and the summons being returned executed, on the motion of said plaintiff, this case is docketed.

Motion by the defendant to remove cause to United States District Court overruled.

And at another day, to wit, at a Circuit Court continued and held for said county of Alexandria, on the 23d day of November, 1866, came the parties by their attorneys, and the defendant, by his petition in writing this day filed, moved the court to remove this cause for trial to the Circuit Court of the United States for the State of Virginia. Which motion being argued, the same was overruled, to which ruling of the court the defendant excepted, and tendered his bill of exceptions, which was received, signed and sealed, and ordered to be made a part of the record in this cause, and is in the words and figures following:

Circuit Court.

Exceptions.

ALEXANDER HUNTER
vs.
HENRY M. BENNETT.

Be it remembered, that at the time of entering his appearance in said action, the defendant filed a petition for the removal of the cause for trial at the next Circuit Court of the United States, in the district where said suit was pending, of which the following is a copy, to wit:

12 *Petition of defendant to remove cause to United States District Court.*

ALEXANDER HUNTER }
vs.
HENRY M. BENNETT. }

VIRGINIA:

To the Circuit Court of Alexandria county:

Your petitioner, the defendant in the above-entitled action, now pending in the Circuit Court of the county of Alexandria, respectfully represents, that the said plaintiff, who is, and has been for the last five years, a resident and citizen of Virginia, on or about the first day of May, in the year 1861, abandoned the possession of said premises, for the possession of which this action is brought, and which are of the value of $10,000, and fled into that part of Virginia which was then under the practical control of one Jefferson Davis and his associates, who then were, and for more than three years thereafter continued in rebellion against the government of the United States, and maintaining such rebellion by force and arms; and that the said Alexander Hunter, and such of his servants and agents as fled with him, actually participated in maintaining such rebellion, and so continued until the first day of April, 1865.

And your petitioner further shows, that afterwards, to wit, on or about the first day of June, 1861, that part of the State of Virginia in which said farm is situated was, by proclamation of the President of the United States, and by various acts of Congress, legally declared to be in rebellion and insurrection against the authority of the United States, and one of the insurrectionary districts of the United States, and so continued to be until long after acquisition and perfection of the title to said farm in one L. E. Chittenden, as hereinafter mentioned.

Your petitioner further states, that afterwards, to wit, on or about the 7th day of Aug., 1862, the Congress of the United States duly passed an act entitled "An act for the collection of taxes in the insurrectionary districts within the United States, and for other purposes;" and that said act became and was in force as a law on and after the seventh day of Aug., 1862, and with the various legal amendments and alterations thereof has continued in force to the present time, and still is in full force and effect.

Your petitioner further states, that pursuant to the provisions of said act, and for the purpose of collecting the taxes legally due the United States within such insurrectionary districts, the proper legal authority of the United States duly appointed John Hawxhurst, Gillet F. Watson, and W. J. Boreman, to be commissioners under said act for the collection of such taxes within the State of Virginia;

13 and the said commissioners, having first duly qualified according to the terms of said act, entered upon the performance of their duties as such commissioners, and continued in the performance of such duties until after the requisition of the title hereinafter stated.

Your petitioner further states, that under and by virtue of

various acts of Congress, and by law, on and before the first day of November, 1864, there became due in respect of the said farm, to the United States, certain sums of money for direct taxes, which had been before that time duly and legally assessed thereon, and with the payment whereof the said land had become charged in law; and that the lien therefor was legally created upon said farm, whereby the same became charged and bound with the payment of said taxes; which lien was paramount and superior to any other lien or claim upon said farm, and which could not be discharged except by the payment of said taxes.

Your petitioner further states, that all acts necessary in order to charge said farm with the payment of said taxes to the commissioners were performed, and all due steps were taken, and notices given, and acts performed, necessary to forfeit the said farm and the title to said farm to the United States, if said taxes were not paid, to wit, on or before the first day of December, 1863.

That neither the owner of said farm, nor any one else, has ever paid the said taxes, nor any part thereof, to the United States, nor to any one in their behalf; and that, so far as they are concerned, the lien created thereby has never been discharged; and that, in consequence of such non-payment, the said farm, before the sale hereinafter mentioned, became legally forfeited to the United States; and the title of the said Hunter, if he had any, and all other persons, was fully exterminated by such forfeiture.

That such farm having become so forfeited, the said commissioners duly advertised the said farm for sale, at public auction, to the highest bidder, on the 11 day of January, 1864, having done all acts necessary to be done to make such sale legal, under and by virtue of said act, at a certain place in the city and county of Alexandria, and that then and there the said commissioners, in due form and process of law, the said taxes having been unpaid, exposed the said farm for sale, at public sale, to the highest bidder therefor; and that the said L. E. Chittenden bid therefor the sum of $8,000, which was the highest bid therefor; and said farm was then and there by said commissioners duly struck off and sold to the said L. E. Chittenden, as the highest bidder and purchaser thereof. That on the same day of said sale said L. E. Chittenden paid over to said tax commissioners the said sum of $8,000, in full satisfaction of his bid aforesaid; and thereupon the said commissioners, on the same day, in due form of law, and according to the statute in such case made and provided, made, signed, executed
14 and delivered to said Chittenden a certificate of the purchase of said farm, giving a description thereof, and certifying that the same was sold and struck off to him, he being the highest bidder therefor, for the sum of $8,000, and acknowledging the payment in full for the same—all according to the statute, and in due form of law. And afterwards, to wit, on the same day, said commissioners paid said money into the treasury of the United States, where it still remains; and said L. E. Chittenden, on his part, did all that was necessary to become the owner of said farm, and has since continued to be the legal and equitable owner of said farm. That on the 12th

day of January, 1864, said Chittenden, under and by virtue of the power and authority given to him by said certificate of purchase, and by virtue of said act of Congress, entered into the possession of said farm, and continued in the exclusive possession of said farm; and as being so in possession as such owner, rented the said farm to your petitioner for the current year 1866, with the privilege of another year's occupation thereof; and he is now in possession of such farm, and in the actual possession thereof, as the tenant of said L. E. Chittenden, by virtue of said lease.

Your petitioner further shows, that the facts above stated constitute his defense to the action above stated. That all the questions therein necessarily arise under statutes of the United States. That said L. E. Chittenden is a citizen of the State of Vermont. That he entered into possession of said premises under color of authority of an act of Congress, and so holds possession thereof, as hereinbefore stated; and he therefore respectfully petitions, that the said cause may be removed to the Circuit Court of the United States, in and for the district of the State of Virginia, in accordance with the statute in such case made and provided; and that such other relief may be granted as may be just and equitable. And your petitioner will ever pray, &c.

HENRY M. BENNETT.

STATE OF VIRGINIA, *County of Alexandria, ss:*

On this 22d day of November, in the year 1866, personally came before me, clerk of the Circuit Court of said county, in said county, Henry M. Bennett, who signed the above petition, and made oath that the facts set forth therein are true, to his knowledge, except as to the matters stated upon information and belief, and as to those matters, he believes them to be true.

JEFFERSON TACEY, *Clerk.*

At the same time he filed an affidavit, of which the following is a copy:

15 *Affidavit of L. E. Chittenden.*

ALEXANDER HUNTER }
vs.
HENRY M. BENNETT. }

CIRCUIT COURT, *Alexandria County*:

I, Lucius E. Chittenden, a citizen of the State of Vermont, temporarily commorant in Tarrytown, in the State of New York, being duly sworn, depose, and say, that I am the owner, as I suppose, of the tract or parcel of land, known as the Abingdon farm or place, containing about five hundred and forty acres, situate in the county of Alexandria, in the State of Virginia, which is the subject of controversy in this action, and which is claimed as his property by the plaintiff herein. That my title to said farm or piece of land was

acquired by purchase of the same at public auction, at a sale held in the city of Alexandria, by John Hawxhurst, Gillet F. Watson, and W. J. Boreman, commissioners appointed and acting under a law of the Congress of the United States approved June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts in the United States, and for other purposes," and the various amendments thereof. That under the provisions of said act, and other acts of Congress, there became due and payable, in respect of the said land, to the United States, the sum of twenty dollars or more, in taxes; and the same being unpaid, the said land was by said commissioners, they having conformed to all the provisions of law in relation thereto, duly advertised, exposed for sale and sold to, and purchased by this affiant, at public auction, for the sum of, as your affiant now recollects, eight thousand dollars; which sum of eight thousand dollars this affiant duly paid to said commissioners, in full satisfaction of said purchase; whereupon the said commissioners executed and delivered to this affiant a certificate, in due form of law, setting forth the sale, by the said commissioners, of the said Abingdon farm, and the purchase thereof, and due payment therefor by this affiant; which sale and purchase took place, and said certificate is dated, as this affiant believes, on or about the 15th day of January, A. D. 1864.

And this affiant further states, that immediately after said purchase, and on or about the first day of February, 1864, this affiant entered into the complete possession of the said farm of land, and through his agents and tenants has ever since remained, and now is in the full and complete possession thereof, and that he has not been in any wise disturbed in his said possession, until the commencement of the present action.

16 And this affiant further states, that the said Henry M. Bennett, the defendant in this action, is now in the actual possession of a portion of the said lands as the tenant only of this affiant, at a stipulated rent. That he does not in any manner claim title thereto otherwise than from and through this affiant, who is legally bound to defend him in his said possession, and is the party really and primarfly interested in the defence of this action.

And this affiant further states, that he claims title to said farm and lands under and by virtue of the provisions of certain acts of Congress of the United States, and in virtue of his possession under said acts, and the rights acquired thereby, only, and not under any acts or laws of the State of Virginia—and that any and all acts done, performed or omitted in relation to said farm or land, or any supposed wrongs or trespasses performed, done, or committed either by this affiant or the said Bennett, have been done and committed by virtue and under color of the authority of the acts of Congress of the United States, and the legal officers thereof, acting under authority derived from or exercised by said acts of Congress, or the President of the United States.

And this affiant further states, that the nature of the claim of this affiant and the relations between him and the said plaintiff, are, and

ever since he returned from beyond the lines of the United States army have been, well known to the plaintiff, and also to his attorney, of record, and that this affiant is not, and never has been a citizen of the State or district of Virginia, but now is and for twenty years last past has been a citizen of the State of Vermont, and that the plaintiff is a citizen of the State of Virginia, as this affiant is informed and believes.

L. E. CHITTENDEN.

DISTRICT OF COLUMBIA, *City of Washington, ss*:

At the city of Washington, on the 19th day of Nov., 1866, personally appeared before me Lucius E. Chittenden, the signer of the foregoing affidavit, and made oath that the same was true, according to his best knowledge, information and belief.

[SEAL.] JOHN F. CALLAN,
Notary Public.

The deft. also, at the same time, tendered good and sufficient surety, as required by sec. 19 of the judiciary act, passed Sep. 24th, 1789, and made a statement to the court that he claimed and should rely upon a title to the land upon the certificate mentioned in said petition, and produced an exemplification of said certificate, and moved that the adverse party inform him whether he claimed a right or title to the land under the grant from the State in which said suit
17 is, and thereupon, and on the grounds mentioned in said petition and affidavit and statement, moved the said court to remove the said cause to the said Circuit Court, which motion was denied, and the deft. excepted to the decision upon said motion and asked that this bill of exception be signed, sealed and made a part of the record of the cause, which was accordingly done.

[SEAL.] H. W. THOMAS.

Not guilty, replication and issue.

And at another day, to wit, at a Circuit Court continued and held for said county of Alexandria, on the 26th day of November, 1866: This day came the parties by their attorneys, and the defendant pleaded not guilty, and thereof put himself upon the country, and the plaintiff does the like.

Jury.

And thereupon came a jury, to wit, W. J. Cross, George Bennett, Joseph McLean, James W. Atkinson, W. C. Richards, W. L. Penn, James T. Beach, John B. Hancock, James Walker, B. Delphy, John Veitch and John W. Grimes, who being elected, tried and sworn the truth to speak upon the issued joined, upon their oath returned a verdict in these words:

Special verdict.

We of the jury find the following facts, to wit, that Alexander Hunter, the uncle of the plaintiff, died seized in fee of the premises in controversy; that said Alexander made and published a last will and testament, valid as a will of lands in Alexandria county, Va.; which will is in the words and figures following, to wit:

Will of Alexander Hunter.

In the name of God. Amen. I, Alexander Hunter, of Abingdon, in the county of Alexandria, in the Commonwealth of Virginia, being infirm in body, but of sound and disposing mind, memory and understanding, do make this my last will and testament, revoking all former wills by me made.

I give to my dearly beloved wife an annuity of one thousand two hundred dollars for and during her natural life or widowhood; I also give to her, for and during the term of her natural life or widowhood, the house (and lott) in which I reside in the city of Washington, with all its furniture and other articles in the use of my family, in and about the same.

I also give to her, for and during the term of her natural life
18 or widowhood, all my slaves and their increase, excepting such as I hereinafter specially bequeath; I also give to her, in absolute right, my claim on the Alexandria and Georgetown Canal Company for damages done to the Abingdon and Summer Hill farms by cutting the said canal through the same, and such sum, in addition to the damages which may be recovered of said canal company, as will make together with said damages the sum of five thousand dollars; I also confirm to her in absolute right the stocks she has purchased, but which I am unable to decide, because I do not recollect in whose name they stand; and lastly in regard to her, if she shall prefer to hold the house and lott I have given to her for life or during widowhood, in fee simple on her executing a deed conveying Summer Hill farm, as it now is, in fee simple, free from all claim and incumbrances of whatsoever kind, to my brother Bushrod Washington Hunter, now a lieutenant in the navy of the U. S., within one year from my death, then I desire my executors to execute a deed to her, conveying in fee simple the said house and lott.

I give to my brother, Bushrod W. Hunter, until his son Alexander attain the age of twenty-one years, my Abingdon farm, in the county of Alexandria, together with all the horses, cattle, sheep, hogs, farming implements, household and kitchen furniture and all other articles used upon the said farm and about the mansion house thereon; and on the arrival of the said Alexander at the age of twenty-one years I give the said farm and other property to him; but if the said Alexander should not live to the age of twenty-one years, in that event I give the said farm and other property to my said brother Bushrod in absolute right forever.

I give to my brother Bushrod W. Hunter all my estate of whatso-

ever kind, real or personal, (including the remainder or reversion of all and any property real or personal, disposed of by this my last will and testament, for a limited time,) which I have not given to others in absolute right.

I give the interest of ten thousand dollars, eight thousand of which are in stock of the State of Missouri, bearing eight per cent. interest, to my sisters Jane, Ann Safford and Elizabeth, to be equally divided between them, for and during the term of their natural lives; the share of my sister Elizabeth I give to my brother Bushrod, in trust for the sole, separate and exclusive use, benefit and enjoyment of my sister Elizabeth Grant, with power in her to dispose of the same as — may please. I particularly commend all my sisters to the brotherly care of my said brother.

I also give to my said sister Ann H. Safford negro woman Susan.

I give to Alexander Hunter, son of William Selden, Treasurer of the U.S., and of my sister Emily, all my lands in Eaton county, in the State of Michigan, which I purchased of John M. Gordon and wife. I give to the other sons which my said sister Emily may leave at her death, but to those she now has till her death, all my land in the
19 State of Iowa. I give to Virginia Selden, daughter of my sister Emily, negro woman Charlotte.

I give to Alexander Hunter, son of my friend John M. Johnson, of Alexandria. the debt, amounting to upwards of two thousand dollars, due me by his father; but if the said Alexander Hunter should die before he attain the age of twenty-one years or intestate, I give the said debt to his brothers and sisters.

I give to my god-daughter, Caroline, daughter of my friend Col. T. P. Andrews, of the U. S. army, the youngest daughter of Celia, one of my slaves.

In case Thomas Woodward, one of my deputies as marshall of the District of Columbia, shall settle up to the satisfaction of my executors all the business with which he has been or may be charged as my deputy as aforesaid, then I give to Thomas Woodward, his son, in consideration of his long and faithful services to me as my said deputy marshall, the sum of two thousand dollars in trust, with powers in his discretion to give his said father the whole or any part of the interest of the same, or of the proceeds of any investment he may make of the said sum of money; at the death of the said Thomas, my said deputy, the said sum of money and such part of the interest on the same, or the subject in which it may be invested, and any part of the unappropriated proceeds of such investment, shall be held for the use of said Thomas Woodward's (my said deputy) family.

I desire that there shall be no appraisement of my estate.

I nominate and appoint my friends John Robert Wallace, of Fauquier, and William D. Nutt, of Alexandria, to be executors of this my last will and testament; and in case my wife should desire to unite in the trouble of administering my estate, and my brother Bushrod and brother-in-law William Selden should find that it would not interfere with their public duties, then I appoint my said wife, brother

and brother-in-law, co-executrix and co-executors with the executors I have first named.

In testimony whereof I have hereunto set my hand and affixed my seal this 17th day of April, 1847.

[SEAL.] ALEXANDER HUNTER.

Signed, sealed, published and declared by Alexander Hunter as and for his last will and testament in the presence of us, who, at said Hunter's request, in his presence and in the presence of each other, have subscribed our names witnesses thereto.

JOS. H. BRADLEY.
ORIS S. PAINE.
WM. BRENT.

20 DISTRICT OF COLUMBIA, *Washington County, to wit*:

ORPHANS COURT, *Feb.* 2, 1849.

This day appeared Joseph H. Bradley and Oris S. Paine, two of the subscribing witnesses to the aforegoing last will and testament of Alexander Hunter, late of Alexandria county, and State of Virginia, deceased, and severally made oath on the Holy Evangels of Almighty God, that they did see the testator therein named sign and seal this will; that he published, pronounced and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehensions, of sound and disposing mind, memory and understanding; and that they, together with William Brent, the other subscribing witness, respectively subscribed their names as witnesses to this will, in the presence and at the request of the testator, and in the presence of each other; and further, that William Brent has since departed this life.

Teste, ED. N. ROACH,
Reg. Wills.

DISTRICT OF COLUMBIA, *Washington County, to wit*:

I certify that the foregoing is a true copy from the original will of Alexander Hunter, deceased, filed and recorded in the office of the register of wills for Washington county aforesaid.

Witness my hand and seal of office this 6th day of February, in the year 1849.

[L. S.] ED. N. ROACH,
Reg. Wills.

UNITED STATES OF AMERICA, *Department of State*:

To all to whom these presents shall come, greeting:

I certify that Edward N. Roach, whose name is subscribed to the paper hereunto annexed, is now, and was at the time of subscribing the same, register of wills for the county of Washington, in the District of Columbia, duly commissioned, and that full faith and confidence are due to his acts as such.

In testimony whereof I, James Buchanan, Secretary of State of the United States, have hereto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 7th day of February, A. D. 1849, and of the independence of the United States of America the 73d.

[L.S.] JAMES BUCHANAN.

21 At a County Court held for Alexandria county, Feb. 7th, 1849:

This paper writing, purporting to be an authenticated copy of the last will and testament of Alexander Hunter, deceased, was offered before this court for probat by William D. Nutt, one of the executors therein named; and it appearing to the court that the original will, of which said paper writing is an authenticated copy, has been proved in the Orphans Court of the county of Washington, in the District of Columbia, according to the laws of said District, Joseph H. Bradley and Oris S. Paine were sworn as witnesses, and severally deposed that Alexander Hunter signed, sealed, published, pronounced and declared the original will, of which said paper writing purports to be an authenticated copy, to be his last will and testament in their presence; and that at the time of doing the same they thought the said testator to be in his right senses; and that they subscribed their names as witnesses to said will in the presence of said testator and of each other.

And thereupon the said copy is ordered to be recorded as and for the said last will and testament of said Alexander Hunter, deceased.

And on the motion of said William L. Nutt, who made oath thereto, and, together with Bushrod W. Hunter, his security, entered into and acknowledged a bond in the penalty of twenty thousand dollars, certficate is granted said Nutt for obtaining a probat of said will in due form. The security justified.

Teste: B. H. BERRY, *Cl'k.*

That by said will he devised the premises in controversy as follows:

I give to my brother Bushrod W. Hunter, until his son Alexander attain the age of twenty-one years, my Abingdon farm, in the county of Alexandria, together with all the horses, cattle, sheep, hogs, farming implements, household and kitchen furniture, and all other articles used upon the said farm and about the mansion-house thereon, and on the arrival of the said Alexander at the age of twenty-one years I give the said farm and other property to him; but if the said Alexander should not live to the age of twenty-one years, in that event I give the said farm and other property to my said brother Bushrod in absolute right forever.

That Alexander Hunter, the said nephew of the testator, attained the age of 21 years on the 4th day of June, 1864, and is the plaintiff in this suit. That the certificate in the words and figures following:

22 *Tax sale.—Certificate U. S. commissioners to L. E. Chittenden.*

No. 53.

UNITED STATES OF AMERICA.—TAX SALE, CERTIFICATE NO. TWELVE.

This is to certify, that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States and for other purposes," held pursuant to notice at Alexandria, in the county of Alexandria, in the State of Virginia, on the 11th day of January, A. D. 1864, the tract or parcel of land hereinafter described, situate in the county of Alexandria and State aforesaid, and described as follows, to wit: five hundred and thirty acres of land, be the same more or less, called Abington, situated on the Washington road, four miles east of the court-house, and said to have belonged to B. W. Hunter, and so entered to him on the book of the State for 1860, was sold and struck off to L. E. Chittenden for the sum of eight thousand dollars, he being the highest bidder, and that being the highest sum bidden for the same; the receipt of which said sum in full is hereby acknowledged and confessed.

Given under our hands at Alexandria, this 11th day of January, A. D. 1864.

JOHN HAWXHURST,
GILLET F. WATSON,
W. J. BOREMAN,
Commissioners.

STATE OF VIRGINIA, *Alexandria County Court:*

CLERK'S OFFICE, *January 19th*, 1864.

The above certificate of sale was this day received in the office and admitted to record.

Teste: JEFFERSON TACEY, *Clerk.*
A copy—Teste: J. TACEY, *Clerk.*

[5-cts. rev. stamp.]

Is genuine, and that the premises in controversy were subject to the direct tax imposed by act of Congress approved August 5th, 1861; that Bushrod W. Hunter and the plaintiff, about the breaking out of the rebellion, went into the rebel lines and service, and so continued until the surrender of Gen'l Lee. That after the advertisement of the sale of said premises referred to in said certificate, and before sale actually made, Charles A. Ware, then a tenant in occu-
23 pation of about a half of said premises, applied to the said tax commissioners to pay the tax and expense, penalty, costs, interest, &c., upon the property, but the commissioners refused to accept the same, except from the owner in person, they stating that they had been so instructed by the Treasury Department. That in the spring of 1865, and subsequent to the 3d day of March, 1865, the plaintiff appeared in person before the said tax commissioners, took the oath to support the Constitution of the United States, tendered to

them the amount of the tax, penalty, interest, expenses of sale, and subsequent proceedings, for the purpose of redeeming the property, but refused to take the oath that he had not taken part with the insurgents in the present rebellion, or in any way given them aid and comfort, as provided by the 7th section of the act of Congress approved March 3d, 1865, amendatory of the act for the collection of direct taxes in insurrectionary districts in the United States. That the premises in controversy were susceptible of partition; that a part thereof might have been sold to have paid the tax, penalty. interest, costs, &c., imposed on it. That the amount of the tax, expenses, &c., for which the sale by the tax commissioners was made, did not exceed the sum of one hundred dollars, and that the said premises consist of some five hundred and odd acres of land in the said county of Alexandria. That the defendant is in possession of said premises, holding under a lease from L. E. Chittenden, the person named in said certificate, and that he entered on the possession on or about the 1st of April, 1866, prior to which time, and subsequent to the 11th day of January, 1864, the possession was in said L. E. Chittenden, claiming under said certificate, which certificate was delivered by said com'rs on the day of its date. That proceedings have been instituted, and are now pending and undetermined in the Circuit Court of the United States for the district of Virginia, in the name of the plaintiff, as relator, against the said tax commissioners as defendants, praying a peremptory mandamus to said commissioners, requiring them to accept the tax, &c., and issue a certificate of redemption.

[The record of said proceedings omitted by consent of parties.]

That the plaintiff received a special pardon from the President of the United States, on the 4th of September, 1865, in the words and figures, following, to wit:

Pardon of A. Hunter.

Andrew Johnson, President of the United States of America, to all to whom these presents shall come, greeting:

Whereas Alexander Hunter, of Alexandria county, Virginia, by taking part in the late rebellion against the government of the
24 United States, has made himself liable to heavy pains and penalties; and whereas the circumstances of his case render him a proper object of executive clemency: Now, therefore, be it known, that I, Andrew Johnson, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said Alexander Hunter a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion, conditioned as follows:

1st. This pardon to be of no effect until the said Alexander Hun-

ter shall take the oath prescribed in the proclamation of the President, dated May 29th, 1865.

2d. To be void and of no effect if the said Alexander Hunter shall hereafter, at any time, acquire any property whatever in slaves, or make use of slave labor.

3d. That the said Alexander Hunter first pay all costs which may have accrued in any proceedings instituted or pending against his person or property, before the date of the acceptance of this warrant.

4th. That the said Alexander Hunter shall not, by virtue of this warrant, claim any property or the proceeds of any property that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

5th. That the said Alexander Hunter shall notify the Secretary of State, in writing, that he has received and accepted the foregoing pardon.

In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington, this fourth day of September, A. D. 1865, and of the independence of the United States the ninetieth.

[SEAL.] ANDREW JOHNSON.

By the President—

WILLIAM H. SEWARD,
Secretary of State.

Which was duly accepted. And if, on the facts aforesaid, the law be for the plaintiff, then we find the issue joined for the plaintiff, and if the law be for the defendant, then we find the issue joined for the defendant.

WM. C. RICHARDS,
Foreman.

And now at this day, to wit, at a special term of the Circuit Court held for said county of Alexandria, on the day and year first herein mentioned, to wit, on the 25th day of February, in the year 1867:

This day came the parties by their attornies; and thereupon
25 the matters of law arising upon the special verdict in this cause being argued, it seems to the court that the law is for the plaintiff.

Judgment.

Therefore it is considered by the court that the plaintiff do recover against the defendant the possession of the premises in the summons mentioned, and his costs by him about his suit in this behalf expended.

And on the motion of the said plaintiff, a writ of possession is awarded him to cause him to have his possession of the said premises.

And on the motion of the said defendant the execution of the judgment in this cause is stayed for sixty days.

A true copy from the record.

Teste: JEFF'N TACEY, *Clerk.*

REC. 261—2

26 And now, at this day, to wit, the aforesaid 12th day of July, 1867, came the parties by their counsel, and the court having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion that there is no error in the said judgment. Therefore it is considered that the same be affirmed, and that the plaintiff pay to the defendant his costs by him about his defence in this behalf expended, and also one dollar damages, which is ordered to be certified to the said Circuit Court. But it is ordered to be entered of record that this case involves questions of such novelty or difficulty as to make it proper that it should be finally determined in the Supreme Court of Appeals.

From the record.

A copy. Test: J. J. CHEW, *C. C.*

Deft's costs, $42 37.

27 VIRGINIA:

HENRY M. BENNETT, plaintiff,
against
ALEXANDER HUNTER, defendant.

At a Supreme Court of Appeals, held at the capital in the city of Richmond, on Monday, January 20th, 1868, upon a writ of supersedeas to a judgment rendered by the District Court for the fourth judicial district, held at the town of Fredericksburg, on the 12th day of July, 1867, affirming a judgment of the Circuit Court of Alexandria county, this day came the parties by their counsel, and the court having maturely considered the transcript of the record of the judgments aforesaid, and the arguments of counsel, is of opin-

28 ion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. Therefore it is considered that the same be affirmed, and that the defendants recover against the plaintiff thirty dollars damages, and also his costs by him about his defence in this behalf expended, which is ordered to be certified to the said District Court.

Defendant's costs in the Court of Appeal, $21 68
in District Court, 42 37

STATE OF VIRGINIA, *City of Richmond, to wit:*

I, M. T. Starke, clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing are true transcripts from

29 the records of my office.

In testimony whereof I have hereunto set my hand (there being no seal of office) this 27th day of January, 1868.

M. T. STARKE, *C. C.*

VIRGINIA:

OFFICE OF SECRETARY OF THE COMMONWEALTH.

I, J. M. Herndon, Secretary of the Commonwealth of Virginia, do certify, that M. T. Starke, whose genuine signature is attached to the foregoing certificate, is the clerk of the Supreme Court of Appeals of Virginia, duly appointed and qualified.

In testimony whereof I have hereto subscribed my name and affixed my official seal this 29th day of January, A. D. 1868.

[SEAL.] J. M. HERNDON,
Sec'y of Com'th.

30 Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States:

The petition of Henry M. Bennett respectfully represents that a certain judgment was rendered against your petitioner at the suit of Alexander Hunter at a Circuit Court for the county of Alexandria, in the State of Virginia, held on the 25th day of February, in the year 1867, in which suit your petitioner claimed and set up a right, title, privilege, and exemption under certain statutes of the United States, whereby was drawn in question the construction of the Constitution and of certain clauses of said statutes of the United States, and in which suit the decision and judgment was against the right, title, privilege, and exemption so claimed as aforesaid, which said judgment was afterwards in all things affirmed by a final judgment of the Supreme Court of Appeals of the Commonwealth of Virginia on the appeal of your petitioner in that behalf, to wit, on the 27th day of January, 1868, as appears of record.

That in said suit, which was an action brought by said Alexander Hunter to recover from your petitioner the possession of cer-
31 tain real estate in said county of Alexandria, which said Hunter claimed that your petitioner unlawfully withheld from him. Your petitioner claimed and set up as his defense a right to such possession by virtue of a certificate of sale made by the tax commissioners of the United States under the act of Congress of June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and the amendments thereto, to one L. E. Chittenden, from whom your petitioner at the time held a lease of the said premises.

Your petitioner, at the time of entering his appearance in such Circuit Court, filed a petition stating the facts showing that he took and held possession of such premises by virtue of and under color of an authority derived from an act of Congress, and verified by affidavit for the removal of said cause for trial at the then next Circuit Court of the United States to be holden in the district where the suit was pending, and tendered surety as required by the act of
32 Congress of March 3, 1863, entitled "An act relating to habeas corpus and regulating judicial proceedings in certain cases," and amendments thereto. The court denied the said petition, and adjudged that the filing thereof was not sufficient cause for the removal as prayed, which decision and judgment were contrary to the

provisions of said acts of Congress. The court also held and adjudged that such certificate of sale was not such evidence of title as the said act prescribes, and that your petitioner had no right to the possession of the said premises by virtue of said certificate of sale, which said judgment was contrary to the provisions of the acts of Congress aforesaid.

Wherefore your petitioner prays your honor to allow a writ of error to the said Supreme Court of Appeals of the State of Virginia, being the highest court of law of the said State in which a decision of the said suit could be had, and in which final judgment was entered, as appears of record, for the correction of the errors aforesaid; and the reversal of the judgment aforesaid, according to the form of
33 the statute in such case made and provided.

HENRY M. BENNETT.
By W. WILLOUGHBY, *Att'y*.

The writ of error is allowed, as prayed, to issue with citation on filing bond with approved security, in the penalty of five thousand dollars, ($5,000.)

S. P. CHASE.

A copy of the within petition was filed in my office on the 5th day of February, 1868.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Va.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Supreme Court of Appeals of the Commonwealth of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals of the Commonwealth of Virginia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry M. Bennett, appellant, and Alexander Hunter, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or
35 wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Henry M. Bennett, as by his complaint appears. We being willing that error,

if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-seven.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Issued January 30th, 1868.

Allowed by:

S. P. CHASE,
Chief Justice U. States.

I certify that a copy of this writ was filed in my office on the 5th day of February, 1868.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Va.

36 The United States of America to Alexander Hunter, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of Appeals of the Commonwealth of Virginia, wherein Henry M. Bennett is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this thirtieth day of January, in the year of our Lord one thousand eight hundred and sixty-eight.

S. P. CHASE,
Chief Justice U. States.

Service of the within citation acknowledged this 3rd day of February, 1868.

S. FERGUSON BEACH,
Att'y for Alexander Hunter.

A copy of this citation was filed in my office on the 5th of February, 1868.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Virginia.

37 Know all men by these presents, that we, Henry D. Cooke and John C. Clarke, are held and firmly bound unto Alexander Hunter in the full and just sum of five thousand dollars, to be paid to the said Alexander Hunter, certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-ninth day of January, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at a Supreme Court of Appeals of the Commonwealth of Virginia, in a suit depending in said court between Henry M. Bennett, appellant, and Alexander Hunter, appellee, judgment was rendered against the said Henry M. Bennett, and the said Henry M. Bennett having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Alexander Hunter, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Henry M. Bennett shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[L. S.] H. D. COOKE.
[L. S.] JOHN C. CLARKE.

Sealed and delivered in presence of—
JOS. T. BROWN.

Approved by:

S. P. CHASE, *Ch. Justice.*

The original bond, from which this is a copy, was filed in my office on the 5th day of February, 1868.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Va.

SUPREME COURT OF THE UNITED STATES.

HENRY M. BENNET, Plaintiff in Error,
vs.
ALEXANDER HUNTER, Deft. in Error.

Points and argument for Plaintiff in Error.

No. 261.

SUPREME COURT OF THE UNITED STATES.

HENRY M. BENNET, Plaintiff in Error,
vs.
ALEXANDER HUNTER, Deft. in Error.

Points and argument for Plaintiff in Error.

STATEMENT OF CASE.

This case comes before the Court upon a writ of error directed to the Supreme Court of Appeals of Virginia.

The suit was originally brought in the Circuit Court of Alexandria County, to recover the possession of land situated in Alexandria County, Va.

The defense is founded upon a certificate of sale made by the United States tax commissioners appointed under the act of Congress of June 7th, 1862, entitled "An act to collect taxes in insurrectionary districts, and for other purposes." Judgment was given for the plaintiff in the Circuit Court, the defendant in error here. This judgment was affirmed by the Court of Appeals, and the writ of error issued on behalf of the defendant in the Circuit Court, who claims that the certificate of sale, is valid and that he has a right to hold possession under it.

The facts appearing in the record are as follows: The taxes against the land were properly assessed as directed by the act, and default having been made in the payment thereof, the land was duly advertised for sale. After such advertisement, and before the sale, a tenant of a portion of the premises under the former owner applied to the commissioners and tendered the taxes, expenses, penalty and costs, but the commissioners refused the money *except from the owner*, under instructions to that effect, as they stated, from the Treasury Department. The land was sold at public sale by the commissioners, January 11, 1864, and L. E. Chittenden became the purchaser at the sum $8,000, and the plaintiff in error is the tenant of said Chittenden. The defendant in error served as an officer in the rebel army throughout the war. In the Spring of 1865 and subsequent to March 3d, 1865, he appeared before the commissioners in person, took the oath to support the Constitution of the United States, tendered to them the

amount of the tax penalty, interest, expenses of sale and subsequent proceedings for redemption, but refused to take the oath that he had not taken part with the insurgents in the rebellion, as provided by the 7th section of the act of Congress approved March 3d, 1865, amendatory of the act under which the land was sold. [See pages 15 and 16 of record.]

He claims to have been the owner under a will which gave the estate to his father until he should arrive at the age of twenty-one years, and on his arriving at such age he was by such will to become the absolute owner. If he died before that time his father was to continue to be the absolute owner. [Page 11 and 14 of record.]

He become of age June 4, 1864. [Page 14.] He obtained a special pardon from the President September 4, 1865. [Page 16.]

The land consisted of 360 acres, and a sale of a portion would have been sufficient to pay the taxes and claims upon it, the taxes amounting to a sum not exceeding $100. [Page 16.]

These are all the facts deemed material to the questions which are proposed to be submitted to this Court.

POINTS AND ARGUMENT.

I

This case involves the constitutionality of the Act of Congress passed June 7, 1862, entitled "an Act for the collection of Taxes in Insurrectionary Districts and for other purposes," and the acts amendatory thereto, or at least of some of the powers contended by the plaintiff in error to have been granted by such acts, and also the proper construction of several of the Sections of these acts.

In order properly to determine the questions necessarily arising in the case, it seems also to be required to examine thoroughly the nature of the power of taxation possessed by Congress, the character of the forfeiture for non-payment of taxes prescribed, and the principles upon which redemption of the lands, which have become so forfeited, are based.

For the purpose of meeting the extraordinary demands upon the government at the commencement of the late civil war, Congress, by the Act of August 5, 1861, imposed a direct tax upon the United States, and to the State of Virginia was apportioned the sum of $937,550.66. It will be noticed that, by the terms of this act, the collection was to be made with the least possible annoyance and hardship to the owner, and privileges of redemption were granted in the most liberal manner. In the first place, personal chattels were to be distrained, and if not sufficient, then the lands were to be subject to sale, but only "so much thereof as might be necessary to satisfy the taxes due thereon, together with an addition of twenty per cent. to the said taxes," and it was only where the lands were not divisible that the

whole were to be sold, and the surplus of proceeds paid to the owner or deposited in the treasury for the use of the owner, with a saving to the owner, his heirs or personal representatives, or "*any person in their behalf* of the right to redeem, &c. In case of non-residents, a year was allowed them after publication by the collector that the tax had become due, and at its expiration their lands were not subject to sale except upon sixty days advertisement, and then only "so much as might be necessary to satisfy the taxes, &c. This legislation shows that Congress had in mind the claims of the owner to all possible privileges and protection consistent with the enforcement of the collection of the taxes assessed.

But this law was found to be wholly inadequate to effect the objects designed. An insurrection had taken place by which the civil authorities had become so obstructed that in many of the States, including Virginia, this tax could not be collected. In fact the territory where this insurrection existed had become *enemy's territory*, and its inhabitants had become public enemies. See Prize cases reported in Black's and Wallace's reports.

In this state of things, Congress, sitting in the capitol, besieged by these enemies, within hearing of their cannon, for the purpose of effecting what the milder provisions of the former law had failed to do, as well as for other purposes, passed the act which we are now called upon to consider.

This Act provides that when *in any State or Territory*, or portion thereof, the civil authority becomes so obstructed that the direct taxes previously laid cannot be collected, which States and Territories are to be thereafter designated by proclamation of the President, then in such State and Territories, each parcel of land is charged with the payment of so much of this tax, and in such proportion as the valuation thereof by the last valuation made before January 6, 1861, bears to the whole valuation of the land of the State, and in addition a penalty of fifty per cent. was charged thereon. Upon the proclamation, which was made in July, 1862, designating Virginia as one of these States, the tax and penalty become a lien upon the land without any further proceeding. Thus the amount of tax became fixed, except that a mere calculation was to be made by the commissioners. When this was done, the owner had sixty days in which to pay the tax whereby the land would become discharged of the tax and penalty.

Section 4 provides: "And be it further enacted that the title of, in, "and to each and every piece or parcel of land upon which said tax "has not been paid as above provided, shall thereupon become forfeited "to the United States; and, upon the sale hereinafter provided for, "shall vest in the United States or in the purchasers, at such sale in fee "simple, free and discharged from all incumbrances, right, title and "claim whatsoever."

By Section 7 of the amended Act of 1863, it is provided that when such taxes are not paid, the commissioners shall advertise the land for sale, and provided the owner does not, *in person*, appear and pay the taxes *before the sale*, shall sell the same and issue to the purchasers a certificate of sale which is made prima facie evidence of the regularity

and validity of sale, and cannot be affected as evidence of regularity of sale, except "by establishing the fact that said property was not "subject to taxes, or that the taxes had been paid previous to sale, or "that the property had been redeemed according to the provisions of "this act."

II

In the first place this act cannot be unconstitutional by reason of any *inequality of its operation*. It provides that *whenever*, in *any* State or Territory, by reason of insurrection or rebellion, the civil authority is so obstructed that the direct tax cannot be collected, *then* this law goes into operation. It applies to *any* and *all* States and Territories. Such as are so situated are to be thereafter designated by proclamation. There is then no inequality so far as States are concerned. Nor is there so far as persons are concerned. *Any* person having land so situated, whether loyal or disloyal, whether residing in Virginia or in Massachusetts, is equally subject to its provisions. The law relates to a *condition of things* and not to *localities* or *persons*. The law goes into effect whenever and wherever thereafter such condition of things exists, and when the occasion arises. That a necessity existed for the most stringent legislation that could be devised cannot be reasonably disputed.

That many owners of land had, *by their own act*, placed themselves in such a situation that they could not easily take advantage of the privileges accorded by the act, is not denied, but *this* cannot be charged upon any of the provisions of the law.

Nor is it claimed by the plaintiff in error that this act is a scheme devised by Congress to punish the owners for disloyal conduct, by taking away their property, which might subject it to constitutional objections. It is not necessary to claim that such was the object of Congress, nor is there anything in the act from which such an object can be inferred.

III.

It will be seen by Section 4 of the act that if the tax is not paid within the sixty days named, the title to the land thereupon becomes forfeited to the United States.

Now, as in this case, the tax was tendered by a tenant of a portion of the land *before the sale*, and as it is claimed that whatever may be the principles applicable to redemption they do not apply to this state of facts, as the land had not, as is claimed, *then become forfeited*, it seems to me proper to examine the nature of this forfeiture there provided for, and I think that it will be found more consistent with all the principles upon which this act is framed, to regard this section as fixing the *time* of the forfeiture at the expiration of the sixty days, rather than at the sale. This is spoken of by the court below as being the fundamental question in the case. [18 Grat. Rep., 126.]

It was claimed in the argument of the defendant, and decided by the Court of Virginia, that, in the first place, notwithstanding the plain language of this section, the title did not pass in any way to the

United States until the sale, and, in the second place that the United States had no constitutional power to forfeit lands absolutely for the non-payment of taxes, even if such was the intention of the act, and that the Government could not acquire title only as a purchaser at the sale provided for. I propose to examine this question of constitutional power first in order.

The counsel for defendant and the Court, below, were obliged to concede that the Legislature of a *State* had this power, which it denied to the Congress of the United States. This had been held so unmistakeably by the courts of Virginia, that there was no escape from this conclusion. In 1790 the Legislature of Virginia passed an act as follows: "In case the tax on any tract of land within this Commonwealth shall not be paid for the space of three years, the right to such land shall be *lost, forfeited and vested in the Commonwealth*; and it shall be lawful for any person to acquire a title to any land so forfeited in the manner prescribed by 'An act for reducing into one the general acts concerning the land office,'" &c. In this statute no provision was made for redemption, except in the case of minors, *femmes covert*, and persons of unsound mind. In certain cases they may save from forfeiture. [See 2 of Revised Code of 1819, 517.]

This statute came before the Court of Appeals in Kinney vs. Beverly, 2, Henning & Mumford Reps., 318, and although it was there held that title did not pass without all the preliminaries prescribed were gone through with, yet no question was raised as to the constitutionality of the act.

In Wild's lessee vs. Serpell, 10 Grattan Reps., 376, the Court uses the following language:

"That the provisions of our statutes, passed from time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the commissioner of revenue, to cause them to be entered thereon in the proper counties, and to be charged with all arrearages of taxes and damages, and to pay all such arrearages as shall be found not to be released by law, and in case of a failure so to do, forfeiting to the Commonwealth all right and title whatever of the parties in default, (under the modifications and restrictions provided by the acts,) are within the constitutional competency of the Legislature has been sufficiently affirmed in decisions which have been made during the present term of this Conrt, in cases arising under these several statutes. The same cases also sufficiently establish that in order to consummate and perfect a forfeiture in such a case *no judgment or decree or other matter of record, nor any inquest of office is necessary, but that the statutes themselves, of their own force, and by their own energy work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the Commonwealth without the proceeding of record or anything in the nature of an inquest of office.* And as title is thus in a proper case divested out of the owner, and vested in the Commonwealth by the operation of the statutes, so where the forfeiture enures to the benefit of a third person claiming under the Commonwealth, by virtue of another and distinct right, the transfer of the title to such per-

son is in like manner perfect and complete, without any new grant from the Commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these objects I have therefore nothing further to say upon this occasion, except that, considering the peculiar condition of things in that part of the State lying west of the Alleghany mountains, and the serious check to population and the improvement of the country and the development of its resources, growing out of it, *a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the Constitutional power of the Legislature to enact them was clear and unquestionable.* [See, also, Statts vs. Broad, 10 Grat., p. 400.]

These authorities abundantly establish the authority of a Legislature to make a complete forfeiture of land for non-payment of taxes thereon and the disposition of the courts to uphold such authority. And it will be remarked that in all the numerous decisions which have been made upon cases arising under the great variety of statutes, while the courts have given the language a strict interpretation and exacted a rigid compliance with their provisions, yet seldom, if ever, has the constitutional power of the Legislature to enact the laws been denied or even questioned in regard to any of their provisions.

While, therefore, neither the Court nor the counsel could deny this power to the Legislature of a State, yet they deny it to Congress. The argument as stated is substantially this: such forfeitures proceed upon the ground of a breach of the condition upon which every owner holds his land; that every owner holds his land upon the implied condition that he will pay his taxes; that on failure to do so the paramount authority of the State, *from whom the land is holden,* comes in on the ground of a breach of this condition, and *for this* declares the estate forfeited; that such a principle is applicable to a *State* from whom the lands are holden, but not to the United States; that to claim any such power for the United States would be interfering with the severeignty of the State; that the United States being a government only of limited powers, has no power except what is conferred upon it by the Constitution, while the powers of a State are limited only by the Constitution of the United States or by the State itself; that although the Constitution gives to Congress the power to levy and collect taxes and to pass all laws necessary and proper to execute this power, yet that this was designed to give it only the usual and ordinary means to enforce such collection, and such means as might be appropriate, and that the power of forfeiture was not such usual or ordinary or appropriate means, and was not so regarded by the States, even though the single State of Virginia may have adopted these means.

This argument starts out with an entire misapprehension of the origin and extent of the power of taxation. The power to tax does not rest alone upon the clauses of the Constitution in relation to such power. It is a power essential to the very existence of all Governments. As is well said in Cooley's Constitutional Limitations, page 479, "It rests upon *necessity, and is inherent* in every sovereignty." The Legislature of every free State will possess it under *the general*

grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not. [See, also, 4 Wheaton's Rep., 316, McCulloch vs. Maryland.] It is a power which has always been, and must of necessity be, exercised by every civilized Government upon the face of the Globe. It is implied in the very existence of any Government or sovereignty, and no nation, State, or even municipal corporation, can be found which does not possess this power. Without it, any government would die just as surely as animal existence would come to an end, without the power to breathe. As the human frame, without a soul, would be a mere mass of dead matter, so would a government, or even any corporation, without this power, be totally destitute of vitality. This is the substance of all authorities upon this point. See McCorral vs. Weeks 2 Overton 215. The State vs. Allen, 2 McCord 56. Livingston vs. Moore, 7 Peters 469. We are not, then, to look alone to the particular clauses of the constitution, apparently conferring this power to ascertain its origin and extent

It is a great mistake to say that the power of forfeiture arises from *eminent domain*. It cannot be said, particularly in Virginia, that the State is the owner of the ultimate property in lands, for the feudal tenure was expressly abolished by statute in 1779. Similar statutes were early enacted in nearly all the States. The cases above cited from the Virginia reports, holding so explicitly the constitutional power of the Legislature, to declare an absolute forfeiture for the failure to pay taxes, could not then have been decided upon such a principle.

Judge Tucker says:—1 Tucker's Blackstone, book 2, page 40—"By the act of 1779 abolishing English tenures, the possession of all lands in Virginia become allodial, that is, independent and held of no superior at all." In Kinney vs. Beverly 2, Henning and Munford Rep. 333, it is held there can be no cause of forfeiture, *because of any condition in the grant, and only in consequence of the positive provisions of some public statute.*

In fact, the power of forfeiture was not exercised in England for the non-payment of taxes, for the very reason that it was considered inconsistent with the principles of the feudal system. Land could not be alienated without the consent or default of the lord. The holders did not have a fee simple, and not a fee which could thus be forfeited. It is different with allodial possessions.

Much of the land in all the States has been granted directly by the United States. It would certainly seem remarkable that the States, in such cases, could claim the exclusive right of eminent domain But there is a certain title which every State, and the nation, has in all land within its territorial limits; and this is a title it holds by virtue of its *sovereignty*. And I think it is here that we may look for the source of the power to tax all property, and to enforce its collection, if deemed necessary, by forfeiture, confiscation, or any other means. And I can see no reason why, for this purpose, the sovereignty of the nation is not as pervading as that of the State.

There is another view which may be taken of this case, which,

though not necessary to be taken to support the power claimed, yet is of itself alone sufficient to fully vindicate and sustain it. This property was in an enemy's country. Its owner had become a public enemy, not only theoretically, but actually, being in arms against the government. For this reason, and by the events of war, this land had become the property of the United States. The theory of the right of confiscation is, that this property belonged to the United States: Congress then had the *right and the power* to seize and condemn this very property. It is true that this right was not asserted, and the power exercised in this particular case, though it comes within the cases enumerated in the confiscation act, passed at about that time. The title of the defendant in error was then really gone, or, at least, the government had sufficient *power* to do with it as it chose, and the privilege of paying the taxes and keeping the land, by such payment, was entirely a matter of favor.

These considerations, I think, show us conclusively that the General Government possesses at least *equal* power with the State. And certainly Virginia cannot deny it. When, therefore, the Constitution *expressly* confers upon Congress the power of taxation and the power deemed *necessary and proper* to carry into execution this power, it cannot reasonably be denied that it was the intention to confer upon Congress equal power with the States, and to enable it to use all means that they claimed the right to use themselves, especially as no restriction whatever is placed upon the exercise of this power.

Whether this power is derived from the sovereignty of the nation, from the general grant of legislative power, or from the particular clauses of the Constitution relating to the subject, I do not think any valid reason can be given why it should be more strictly construed than the power which all Governments possess, either as to its objects or the means by which it is exercised.

"A statute ought not to be declared unconstitutional unless its nullity and validity are placed beyond all reasonable doubt. [16 Pickering, 95.] In Ogden vs. Saunders, Justice Washington says: "If I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the constitution is placed beyond all reasonable doubt. (See, also, Fletcher vs. Peck, 6 Cranch Rep. 128.)

In Cooley's Constitutional Limitations, page 479, the author says: "The power to impose taxes is one so unlimited in force, and so searching in extent, that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It imposes a burden which, in case of failure to discharge it, may be followed by seizure, and sale and confiscation of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through this power."

In McCullock vs. Maryland, 4 Wheat., 428, Chief Justice Marshall says:

"The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation:" "that the power to tax involves the power to destroy is a proposition not to be denied."

The court below, while admitting that Congress is the sole judge of the *necessity* for the means adopted to carry out its powers, decides, or, at least, contends, that the means must still be appropriate as a means of such execution. It would seem very plain that if a certain means is *necessary* to produce a result, and such means *does* produce it, it must be *appropriate*. Surely forfeiture brings the money into the treasury, and the question of *propriety* of using such a harsh means depends only upon the question of necessity, and of this Congress is the sole judge. Forfeiture was an *appropriate* means for a State, but not for the United States! A means may be appropriate and not necessary, but it cannot be necessary and not appropriate.

In the case above cited [4 Wheaton] the court say: "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means," also "to employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Congress has the right to employ those means which, *in its judgment*, would most advantageously effect the object to be accomplished, and *any* means adapted to the end, any means which tend directly to the execution of the constitutional powers of the Government, are, in themselves, constitutional. Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government to undertake, to inquire here into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disdains all pretensions to such a power." [See, also, 18 How., 281.]

I have dwelt upon this subject of constitutional power at considerable length, because by the court and counsel below the construction not only of the 4th section, but of other sections contended for by us, was met at every turn by this question of *constitutional power*. I think that I have shown that this question need not at all embarrass the court in determining the true construction of any of the provisions of the law.

IV.

Taking it, then, for granted that Congress had the power to declare that the land should be forfeited at the expiration of the sixty days mentioned in the fourth section, let us see whether this *was* done, and *the nature of such forfeiture*.

That some kind of forfeiture then took place seems to be declared in the plainest possible language.

The title "shall *thereupon* become forfeited to the United States." But it is claimed that this is somewhat obscure by reason of the latter cause of the section, which declares that, "upon the sale hereinafter provided for, such title shall vest in the United States or in the purchaser at such sale *in fee simple*, free and discharged from all incumbrances, right, title and claim whatsoever."

A little consideration will clear up this apparent obscurity. Upon the default which is complete at the expiration of the sixty days the title is divested out of the owner and becomes forfeited to the Government in its character *as a sovereignty*. The title of the owner is completely gone. The act which produces this forfeiture, the default is then entirely completed, and the title is then certainly not in him. But while this is so the Government holds it in its character *as a sovereign in trust* for the purpose of a sale to satisfy the taxes and dues upon it. While it is so held it can make no other use of it, but at the sale, at which it is authorized to bid by the statute, it may acquire title as a *purchaser*, and then it or any purchaser holds such title *in fee simple, free and discharged from all incumbrances, right, title and claim whatsoever*.

Now, so far as the owner was concerned, this forfeiture was absolute and complete. Forfeiture, as defined by Blackstone, 2 vol., p. 267, "is a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements or hereditaments, whereby he loses *all* his interest therein, and they go to the party injured as a recompense for the wrong which either he alone or the public together with himself hath sustained."

Now, if this forfeiture was not complete at the expiration of the sixty days, upon what principle could it be held to be more complete at the sale? The *occasion*, the *reason* of the forfeiture was the default. Then the Government acquired the right to sell. After that no act of the owner occurs to give the Government additional power over or title in the land. The mere act of sale without the consent of the owner could confer no additional title. To say that the title is in the owner up to the time of sale would lead us into a palpable absurdity. The Government must have something to sell. It can only sell what it has. It cannot transfer the title of the owner without his consent. It could not purchase such a title at its own sale. Title passes at the sale not from the owner, but from the Government. If the construction contended for by the defendant in error be correct, in cases of sales made to other purchasers the Government *never* acquires title, but undertakes to convey the property of one individual to another without his consent.

I think these zealous defenders of the Constitution would have some difficulty in harmonizing such a theory with it.

By the original act no provision was made for anybody to redeem the land after the expiration of the sixty days and before the sale. After the sale the owner, or any person having a valid lien or interest, could upon certain terms prescribed redeem the land. By the amended act *the owner*, if he would appear in person, could by complying with certain terms redeem. This shows that the Government is con-

sidered as the owner of the property in some capacity before the sale, and would be inconsistent with any other theory. Where the intention of the Legislature is clearly indicated that the title shall pass by the mere force of the forfeiture, no inquisition of office is required. [See 10 Grat., 405; 7 Cranch, 603; 5 Wallace, 211.]

It is claimed, however, by the counsel for the appellant, that in this case the forfeiture is not complete—that there are two kinds of forfeiture; one like the forfeiture of a vessel for some offense, and one like the forfeiture of a mortgage, which is only for the purpose of enforcing a lien upon the property, and that this forfeiture is of the latter kind; and that the title to the property did not change until the sale provided for.

Now, this distinction between different kinds of forfeiture cannot be maintained. Upon forfeiture there always results a change of title. In the case of a mortgage the title changes upon the execution of the mortgage, and is in the mortgagee. At the same time there is a lien upon the property for the debt. The mortgagee has a title, as well as a lien. Holding such title and lien is not at all inconsistent. When the mortgagor is in default for non-payment he has nothing left but the equity of redemption, and originally he did not have even that. [See 2 Coke, title 205, and 4 Kent, 140.] So, in this case, the United States, after forfeiture, has both the title and the lien. Holding both are not more inconsistent than in the case of a mortgage. And after such forfeiture there exists only such right of redemption as the Legislature saw fit to prescribe.

It will be observed that the lien of the tax and penalty is prescribed by the first section, and by the second section it becomes chargeable upon the land as such lien *at the time of the President's proclamation*. The different rights of the Government are therefore plainly prescribed. First, it has a *lien*. This continues until default, when for the purpose of enforcing this lien the title is forfeited to the Government *as a sovereignty*; and in the third place, if a successful bidder at the sale, it holds the title in fee simple, free and clear from all incumbrances, &c. It was deemed proper that making the tax and penalty a lien should be one of the steps to be taken to justify the forfeiture declared. Perhaps one reason of so doing was that under this act there was no means of enforcing the collection of the tax but out of the land itself. By the act of 1861 the tax is to be paid first out of personal property. By this act the tax is directly and solely against the land itself, and therefore properly declared a lien upon it.

It will be observed that this penalty is not in the nature of a punishment. It is not anything that can be collected from the person. It cannot be collected even out of the land if payment of the tax is made before default. After default and forfeiture it becomes simply one of the terms of redemption. It is not, therefore, that sort of penalty or punishment for non-payment of taxes which has been regarded by some courts as liable to constitutional objections.

It is argued that because a penalty of fifty per cent. is imposed for non-payment at the end of sixty days, and naming this as a penalty

"*eo nomine*," that therefore we are to infer that no other penalty was intended.

Now, if the law simply stated that such penalty should be incurred, we might infer that no other penalty was intended; but it *does* say that the land shall be forfeited It does not, it is true, *call* it a penalty, but it is a penalty nevertheless, and is prescribed by the act. Whether the best or clearest language is used or not it is not material to inquire, provided we arrive at the true result.

When we consider under what circumstances the law was passed—that it was on account of the difficulty of collecting the tax, and because the former act was not stringent enough; that it was designed to operate in territories occupied by public enemies, who were in arms against this law, as well as all others, how absurd would it be to prescribe such a penalty alone as the addition of fifty per cent. to the tax; and if the lands were to be sold it was simply to pay this additional penalty, the balance to be retained by the owner of the land. It was designed to *enforce the collection of the tax*, and if construed as contended for by the plaintiff would be entirely abortive for that purpose, and instead of being a measure of terror, as it was designed, would be a subject of laughter and contempt.

It is asked, if it was intended to take the land itself why was this penalty of fifty per cent. prescribed. It will be observed that if payment is made at any time within the sixty days only the tax is required. If payment is made afterward, and after the forfeiture, except by the owner, before sold, the penalty must be paid and interest.

This delay is of itself a good reason for the imposition of the penalty, and is sufficient to account for it. This delay might be made for a long time. In some cases of redemption it might be for two years after sale. It might be a long time before the commissioners could effect the sale. In the mean time the Government, being in the most pressing need of money, says if you do not pay promptly you shall pay fifty per cent. as a penalty for delay, and the payment of this penalty shall be one of the terms of redemption.

The object of the penalty is to punish the party to that extent, *even in cases where he redeems*, unless such redemption is by the *owner before sale* and to give the Government some compensation for delay, and to induce the party to pay before the expiration of the sixty days. It is true the declared purpose of the act is to collect the tax, but *as a means of collection, and coercion of such collection*, it did, as it was proper to do, declare and impose punishments for non-payment, and the forfeiture of the land was one of the punishments declared, and the fifty per cent. penalty was the other. The party might save himself from the former and most severe one by suffering the latter and complying with the terms of redemption prescribed.

It is said by the counsel for appellees that no provision is made in the act for a disposition of the surplus money after paying the tax, penalty, and costs. Were this true it would show nothing more than an oversight *in regard to such disposition. That under any construction* of the law there would often necessarily be such an overplus would be inevitable. This being so, either under the construction contended

for by the appellees or by the appellants, no inference can be drawn from such an oversight or omission. At most it could be nothing but an inference.

But it is insisted that there is no such oversight, but that the sales spoken of in the twelfth section include the sales mentioned in the seventh section.

Again, section five provides that the commissioners shall give bonds to account for and *pay over into the Treasury* all moneys coming into their hands. The fact that they are required to give such heavy bonds, $50,000 each—$150,000 in all—shows that large sums of money much larger than the mere taxes and penalties, were expected to come into their hands, to be disposed of by them.

We are led to believe that the forfeiture of the land was intended to be entire and complete from the further consideration that such forfeiture is by no means an uncommon thing. It has repeatedly been done, and that, too, when the occasion and necessity for such stringent measures were much less than the occasion of this act. The act above referred to, as passed by Virginia in 1785, is unquestionably of that character, and in that act the owner had no privilege of redemption. We have shown that Congress had the clear right to impose such forfeiture—they had a disposition to make the most stringent and effective law possible; the occasion called for it, and we think they did do it. The more we investigate the language of the act the more we consider the nature of a forfeiture, and the more light there is thrown upon the subject by the occasion and circumstances under which the act was passed, and the necessities it was intended to provide for, the more shall we become convinced that by the forfeiture arising from non-payment of the tax the title passed completely to the United States, became the property of the Government, entirely under its control and for it to dispose of at its own will and pleasure, and none can say, "Why do ye so?"

I have argued at considerable length to show that the forfeiture of the property took place at the end of the first sixty days mentioned because this was argued in the court below, and held by such court to be the fundamental question in the case. [See 18 Grattan, 126.] I have also argued because it seemed to me more in harmony with the true principles of the exercise of this power of taxation and of this act.

But even if I am mistaken in this, and the Court should think that the title is not divested out of the defaulting owner and does not vest in the United States in any capacity until the sale provided for, I maintain that it does not follow that the declaration that in order to save the land from forfeiture the owner must appear *in person* is beyond the constitutional power of Congress. If it had the greater *power* to forfeit the land absolutely upon default, as I think I have clearly shown, it also had the lesser power to say, as it has said to the owner, "Your land will be forfeited if the taxes are not paid within the sixty days, and if default is made by non-payment you cannot save the land from forfeiture but by paying the tax with ten per cent. interest thereon and costs incurred before the sale *in person*." Congress, by virtue

of its unlimited power, in right of its sovereign power and of the provisions of the Constitution, if it was deemed necessary, had the right, at least, to make this precedent denouncement of a penalty for default or warning, and that the consequences of such default could be avoided only in this particular manner. And having made it, it cannot be expected that the Government will, when the occasion happens, foreseen by it, retract from its position because the result works a hardship upon the owner and because the court may think it unnecessarily harsh and without reason. And this would be so independently of the principles of *redemption* which we shall contend are applicable to other facts of this case.

The question, then, of the *power* of Congress to prescribe this appearance in person is not, then, really affected, whether we consider the title to have passed before the sale or not.

VI.

It is argued, however, that the true construction of the amended section is, that the appearance of the owner in person has no effect only to limit the power of the commissioners to bid off the property. It will be seen that by the *original* section *no provision whatever* is made for saving the land from forfeiture by *any* one *after* the default and *before the sale*. But it is claimed that even under this section, as *originally* framed, payment of the taxes before the sale would have had the effect to destroy the authority to sell, and this, too, notwithstanding the positive provisions of the act. This, it is said, results from the fact that the only object of the sale is to collect the taxes, penalty and costs, and that payment accomplishes beforehand this object, and if such object was accomplished by such payment, it did not matter by whom it was made; that the effect of the amendment being *only* to limit the authority of the commissioners to bid, it did not destroy this right which the owner had even under the original section, and that under neither section does it appear that it is *expressly* provided that the appearance in person would prevent the sale.

The court below did not coincide with this view. It rests mainly upon the idea that the only object of the Government was to collect the tax.

It is true that this was the main object, but as a means of accomplishing this object it declared what would be the consequences of default as a warning, and it was to carry out this declaration and fulfill its prescribed punishment that by the original section *no* person could redeem until after the sale upon the terms prescribed, and by the amended section no one but *the owner in person* could save the land from being sold.

If I am right in the view that the property is forfeited to the Government upon default for non-payment, as I think I am, then another object of the sale is to convert the property into money and make it available, or to change its character so as to give to the Government a title in fee simple, to be used in such manner as subsequent sections of the act prescribes.

I think that, upon careful examination of the amended section, it will

appear that it is not true that the only effect of the appearance *in person* is to limit the authority of the commissioners to bid. The general conclusion of the amended section, although somewhat obscurely expressed, is, I think, that payment *by the owner in person* would have stopped the sale.

VII.

But it is argued that if it be understood that the act does declare in terms that to prevent a sale, payment in person must be made, such a declaration would have no legal effect, because such appearance in person would be immaterial; that the entire object of the act is accomplished by payment no matter by whom made.

This view, too, misapprehends the object of this section. The object of this law is to carry out what the Government should be the consequences of a default. And when the Government says that *only the owner, and he in person,* can avoid such consequences by payment *in person*, it is trifling to say that some other one may do it just as well, and that some other way will answer.

When the Legislature prescribes certain modes of proceedings in courts in order to obtain a particular remedy, and says that no other mode shall be available, the court says if that mode is not pursued you must go out of court. Statutes are made to be obeyed, and when we ascertain what they mean, the courts must obey them, and not attempt to fritter them away, because there is an apparent hardship in a particular case. The law says the *owner* must *appear in person* and pay the tax. The counsel contends that whether the person who offers to redeem was legally authorized does not affect the merits of the case. What difference, says he, does it make to the Government whether payment is made by the party in person or by some one else? It is sufficient to say *"Ita lex scripta est."* Says he, will the law be satisfied with nothing but a literal compliance? The answer to this is, no. Suppose, says he, that payment had been required to be made with the *right* hand instead of the *left*, must it be made absolutely with the *right* hand. We say, yes. Why, says he, does it make any difference whether a promissory note is paid by the maker in person or not? Indeed it does not; but suppose such note was a creation of a statute, and suppose such statute provided that payment could be made only by the maker in person, *then* it would make a difference.

Not fully satisfied with his argument on this point, the counsel further insists that by the word owner is meant any interest whatever, and that the tenant, or the party in possession, is an owner within the meaning of the term, and claims that whoever may redeem *after* the sale may also do it *before* the sale. In support of this is cited the case of Dubois vs. Hunter, 10 Peters, 23.

Now it may be conceded that in this case, which arose upon a statute which did not define the term *owner*, and upon cases arising under State laws in different States which do not define the term *owner*, that the liberal construction usually given to revenue laws in

ordinary times would make any person having an interest an *owner* for the purpose of redemption.

But when the Statute plainly declares, as it does in this case, who is meant by the term owner, this spirit of liberal construction cannot be invoked to do away with the declared intention of the framers of the act. This act makes a plain distinction between the *owner* and the *person having an interest.* This distinction being made it must be recognized.

By another provision, in the same section, it is declared that the owner, or any person having any valid lien upon, or interest in, the same may, upon certain conditions, redeem within sixty days *after sale.* The owner may redeem before the sale. When speaking of redemption after sale, it says—*the owner, or any person having any valid lien or interest.*

The *owner*, if he redeems before the sale, may redeem without taking the oath. He may do it without paying the penalty. He may do it without paying but ten per cent. interest from the levy of the tax. These are privileges accorded to the owner alone. But the person having an interest must be loyal. He can redeem only *after the sale.* He must take the oath; he must pay the tax and *penalty;* he must pay interest at the rate of *fifteen* per cent. *from the date of the President's proclamation*, together with the expenses of sale. Is not a most manifest distinction made here between the owner and the person *having an interest?* The substantial language of the act is this: The *owner*, on certain terms, may redeem *before* the sale; the owner, or any person having an interest, may, on certain other terms, redeem *after* the sale.

That only the substantial *owner* is referred to in this section is further apparent by contrasting the language here used with the act of 1861. This privilege of redemption is there given to the owner, "*or any one in his behalf.*" The last qualification is carefully excluded from the section under consideration.

In the face of such language can we say that the person having merely an interest, the tenant or party in possession, may redeem *before the sale?* Admit that he may do it after the sale, if he was loyal, and this does not appear, that is not the case here. No offer was made by such party *after* the sale. No offer was made to pay the *penalty*, the *fifteen* per cent., or the costs of sale. The tenant, it is true, may redeem, but he must do it in the way prescribed. If the law does not provide that a person having merely an interest can redeem only *after the sale*, and upon the terms prescribed for *redemption after the sale* then it is difficult to conceive what is expressed. And where the law is so plain and manifest we cannot disregard it, and say that Congress did not mean what it said. You may construe the law as liberally as you choose for the owner, where there is doubt, but after all the *intention* must be the guide, especially where, as in this case, there can be no doubt.

That there was a design on the part of Congress to restrict the privilege of redemption before sale, to the *owner in* person, the real owner, is evident, further, from the general nature of the act, the ter-

ritory, and the persons mainly to be affected, and the condition of the country at that time. The law was to operate in enemy's territory, upon persons who, although public enemies, the nation desired to win back to their allegiance. Thousands of the owners of lands had gone beyond the lines of our armies, and it was determined that such persons, who had abandoned their lands, or perhaps left some persons in charge of them, and who were in arms against the nation, should not have these privileges of redemption, which were purely matters of favor, without *appearing in person*, to do which, they would be compelled to come within our lines, and thus perhaps, in many cases, to lay down their arms. Congress did not mean to allow them to take advantage of the terms offered through an agent, instigated, perhaps, by some message sent unlawfully through the lines. I do not mention this as a cause of the passing of this measure, nor as showing that thereby it was intended to punish the person in default for the offense of being in rebellion, but as a circumstance which all know to have existed, and is a good and valid reason for this discrimination between *owners in person* and owners acting through an agent, a tenant, or a party in possession.

The counsel calls attention to the fact that the certificate of sale may be impeached by proof of *payment before sale*. This is true; but the *manner* of such payment is not prescribed in this proviso. Such payment must be made in the manner prescribed by the other provisions of the act, and this may be by *any* one before default, and by the owner in person after default.

It must be apparent from these considerations, upon the construction of the law, and the light thrown upon it by the circumstances existing at the time, and no doubt operating upon the legislative will, that the appellees are not entitled to recover, by reason of the offer of the tenant, or party in possession, to redeem before the sale.

VIII.

In order to accomplish the forfeiture of the property, and to vest the title in the purchaser, it is conceded that the law should be strictly followed, and that every requirement should be complied with in the minutest particular And it is also conceded that the purchasers must show this to have been done.

The statute has provided how this may be done, as it had a right to do. It provides that the certificate of sale shall be *prima facie* evidence of the regularity and validity of the sale, and conclusive except as to three things therein named.

The Legislature possesses competent power to change the common law rules of evidence and declare that the deed itself shall be received in all courts as *prima facie* evidence, that all the pre-requisites of the law have been complied with, and thus shift the "*onus probandi*" from the shoulders of the purchaser to those of the owner. [See 13 How., 472.]

Such deed may also be *conclusive* evidence [18 Ohio 400.]

By this act the certificate is evidence not only of the *regularity*

but of the *validity* of the sale. It could not be *valid* without every pre-requisite had been complied with.

An Act of the Virginia Legislature of Feb 9, 1814, directs the sheriff to execute a deed to purchaser. Section 38 provides that after time of redemption the regularity of the proceedings under which the purchaser claims title shall not be questioned unless it appears on the face of the proceedings.

This statute came before the court in Hanagon vs. Grimmett, 10 Grattan, 421, where it was sustained, and it was decided that the deed need not show all the steps to have been taken. The Court say, page 435: "The 38th section of the act of 1814 restricted the party to irregularities appearing on the face of the proceedings, not even permitting the contesting party to look beyond the proceedings, and prove by evidence "*aliunde*," *though that might be the sheriff's receipt for taxes, that the taxes had been regularly paid*, for it is expressly provided that after the expiration of the time for redemption the arrearage of taxes for the non-payment of which the land was sold should not be denied."

If then the certificate of sale has the full effect intended, it is very plain that it shall not be affected as evidence of the regularity and *validity* of sale only by showing "that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act.

It is not pretended that the property was not subject to taxation, If the law is constitutional then it would seem that only two questions can be raised.

First, had the taxes been paid? We have already shown that they have not.

Second, had the land been redeemed.

But we *do* find the counsel raising other objections, and one which he strongly urges is, that the commissioners had power to sell only a sufficient amount of the land to pay the taxes, penalty and costs, and, having sold the whole land instead, such sale is void.

This is a question raised as to the *regularity and validity of the sale*, and the first answer suggests itself at once, to wit: *This question is being precluded from being raised by the certificate of sale.*

This is not one of the ways by which such certificate of sale *can be affected as evidence of title.*

Why is this not a sufficient answer? This is, however, argued as referring only to the mode and manner of conducting the sale. To sustain this reference is made to Garret vs. Wiggins, 1 Scammon, where, under a statute which made the certificate evidence of the regularity and *legality* of the sale, it was held that this related only to the mode and manner of the sale, and not to the authority to make the sale. Now it seems to me that this statute was drawn for the purpose of avoiding the principle of that decision.

It was there held that inquiry could be made into the *validity* of the sale, notwithstanding the provision of the statute, and therefore, in order to avoid this result, *this statute*, instead of using the words "regularity and *legality* of the sale," employs the terms "regularity

and *validity* of the sale." This shows the determination of Congress to assure the title of the purchaser in the most perfect and complete manner possible and to protect him by all possible means from the difficulties which courts have interposed and which have made tax titles so notoriously insecure. It remains to be seen whether the Court will interpret this section in the same spirit which evidently animated the framers of this act.

It is argued that, notwithstanding this proviso, you can make this inquiry because it goes to the *authority* of the commissioners If that is the reason, why cannot inquiry be made as to their authority in any other particular? Why not inquire whether the property was properly advertised or not, or why any other step to be taken before the sale was properly taken? All these steps should be taken to give the commissioners *authority* to sell. And would not such reasoning entirely break down the barrier which this proviso sets up for the defense of the purchaser?

Now, although in this case a portion of the land would have been sufficient to pay the taxes, penalty and costs, and it was so situated that such portion might have been sold, yet in many cases this could not have been done, as in the case of a house and lot in a city. If the commissioners were restricted, as contended for, then in all cases they had power to sell only just precisely enough to pay such taxes, penalty and costs, or, at least, they must not sell what would be considered an excessive amount. This shows the necessity of giving some discretion to the commissioners. And will it be contended that the proper exercise of this discretion on their part can be inquired into by a court in the face of the provisions of this act? Was the title of a purchaser to depend upon the verdict of a disloyal jury upon this point? If so, the law was a snare, and its only effect would be to delude the purchaser, who relied upon the Government and the courts to protect him, out of his money.

IX.

But aside from this let us see whether the commissioners were not authorized and required to sell the whole of the land by the act.

It is argued that the sale being a mere compulsory proceeding for enforcing a lien, and the object being merely to raise out of the property the amount charged upon it, then the general principles applicable to such a proceeding would apply and restrict the commissioners to a sale of only enough to satisfy such charge. In support of such general principles reference is made to cases where a collecting officer is thus restricted.

It is also argued that the act *being silent* as to the quantity to be sold authority to sell *the whole* is not to be inferred. And in support of this is quoted a case arising upon a statute of Georgia, reported in 4 Cranch, 403, and it is asserted that an absolute forfeiture cannot be made without "due process of law."

This argument rests upon several assumptions, none of which are true These assumptions are as follows:

First. That the sale is a mere compulsory proceeding to enforce a lien.

Second. That a sale has for its object only the collection of the tax, penalty and costs.

Third. That the statute is silent upon the subject.

Fourth. A misapprehension of the term "due process of law."

First, the sale is *not* a mere compulsory proceeding to enforce a lien. The purpose of the sale is to convert the property previously forfeited and belonging to the Government into money, so as to make it available to the Government This is shown by the considerations already advanced.

Second, the object of the sale is *not* merely to raise sufficient money to pay the tax, penalty and costs. The declared object of the law, it is true, is to collect the tax. But the forfeiture is a threat or penalty for non-payment. It is a *means* of enforcing the voluntary payment of the tax. It is not a mere idle threat not intended to be enforced, and with no power to carry it out. The forfeiture is the execution of this threat, and the sale is to enable the Government to make all the money it can out of its own property.

Third, the statute is not silent upon the subject. It expressly declares and enjoins that the property thus forfeited shall be sold—*the same* property. It says the same parcels of land shall be advertised and sold to the highest bidder, (sec. 7). It declares that *"the commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum."*

The very fact that in the act of August, 1861, imposing the direct tax, it expressly declares that only sufficient of the land to pay the taxes shall be sold, while in this act the language is that the property, the *same* property, shall be sold, is alone sufficient, according to the ordinary rules of construction, to show the intention to authorize the sale of the whole property.

Fourth, we have shown by authorities heretofore quoted that such *forfeiture* and proceedings is a *legal process*, fully and completely authorized by the Constitution, and are embraced in the alternative *law of the* land.

That it was intended to authorize a sale of the *whole* land is further shown by Sec. 4, of the act of March 3, 1865. This provides that any loyal lien creditor may after period of redemption has expired be paid out of the balance of the proceeds of sale after the same shall have been paid into the treasury of the United States [See also Sec. 7, Lib. of 1865.

These considerations fully show that the commissioners did *not* exceed their authority by reason of selling the *whole* of the land instead of a part, even if such inquiries were not precluded from being made by the certificate of sale. It is submitted, however, that such inquiry is expressly precluded by the terms of the act in the most positive language that could be employed.

X.

If we consider the nature of this act, and the objects sought to be accomplished by it, we will see that there was a reason for taking the whole of the land instead of a part

It will be admitted that this is an extraordinary law. It was passed under extraordinary circumstances. It is the creation of the sovereign power of the Government. The occasion called for the highest exercise of this power. It was intended to operate in insurrectionary districts and upon owners who were public enemies. It was well understood that some of these owners had abandoned their lands and were in arms, seeking to destroy the Government itself. This should be remembered in the construction of all the provisions of this act. There was some reason for passing this act in addition to the act of 1861. What was it, if the lenient construction contended for, and which we admit, is to be adopted in the consideration of tax laws in ordinary peaceful times is to be adopted. If only enough of the land was to be sold to pay the tax, penalty and costs, and the remainder be left to the owner; if after default he could, by a message sent unlawfully through the lines, procure his tenant or some other person to pay the tax, while he himself still remained in arms, what was the use of passing this law? Why was not the former law good enough?

The Government *did* design to take the whole land and to appropriate the whole of the proceeds. There is no disguise about it, and no such indirection as charged upon it.

While the primary object is to collect the taxes it had the secondary object of encouraging the return and promoting the settlement of a loyal and tax-paying population.

This too was a perfectly legitimate object. The Government had the right to provide for the settlement of these lands so as to make them more readily subject to future as well as present taxation. These lands were certainly part and parcel of the public domain, and as such subject to taxes, and so to be treated in the financial policy of the Government as to subserve the needs both future and present of the Treasury.

Congress has power to provide for the *general welfare* of the nation It has sovereign and unlimited power to levy and collect taxes and to pass all laws to best provide for the execution of these powers. These may be used separately or together in support of each other as Congress shall deem necessary. This land was already under the complete power of Congress by reason of being in an enemy's country, and certainly under these powers, and in these circumstances, they have power to pass laws to effect the object here indicated.

The act of Virginia, heretofore referred to, was sustained on the ground that the settlement of titles, &c., was a proper object, and for that reason the power of the Legislature to enact it was "clear and unquestionable." The object of the act is as stated in the title, to collect the tax, *and for other purposes.*

XI.

It is contended, however, that the terms of redemption, as pre-

scribed by this act, were sufficiently complied with *after the sale*, and that the subsequent acts restricting these terms were not applicable to this case, and if so designed, they were *ex post facto* and unconstitutional.

This renders it necessary for us to inquire into the nature and principles of redemption.

The forfeiture for which we have been contending, even if not absolute and complete before the sale, was certainly after it. This being so, we see that the terms of redemption are merely *privileges* offered gratuitously by the Government. This should be distinctly seen. Forfeiture is one thing, redemption is another. They are not even spoken of in connection with each other. These privileges are entirely, then, matter of favor. They are not vested rights which the owner or any party in interest can claim. They do not rest upon any contract or obligation. Like the conditions of salvation they rest entirely upon grace. The party does not come in by reason of his merit, but because he has accepted the terms offered, and complied with the requirements of such redemption. It therefore follows that the Government may impose such terms of redemption as it chooses. It might not allow any terms of redemption whatever. It simply says to the owner or person having an interest, if you choose to do so an so, you may have such privileges as I name. This offer can be withdrawn or changed at any time. No right is vested until the offer is accepted.

This privilege of redemption should not be confounded with an equity of redemption. An equity of redemption is a *right*, a privilege of redemption is a *favor*—one cannot be taken away without the owner's consent, the other can.

When the owner of the land allows his land to be sold or forfeited he knows, or is bound to know, that he has no interest left but this privilege. He knows that this being so, the Government may at any time modify it or take it away, at its pleasure. Even if it were an equity of redemption it would be an equity subject to this contingency. If knowing this (as he is bound to know) he suffers the land to be forfeited and sold as a penalty for his negligence he cannot then complain if the Government avails itself of its rights and does take it away or imposes new terms of redemption.

Under the confederate government it was held where exemption from service had been purchased, yet that the confederate congress could ignore this and by subsequent acts again render the party liable to service, because this permission to purchase exemption was "an act of grace and favoe on the part of the government, and not as a matter of contract. [16 Grattan. 470; see also The State Bank of Ohio vs. Knoop, 16 How., U. S. R., 369.]

XII.

Now the purchaser, who is held to a strict compliance of the law on his part, is entitled to demand the same strict compliance with the terms of redemption on the part of him who comes in as a matter of favor. And no matter what these terms may be, whether absurd, un-

reasonable, or not, they must be complied with. [Blackwell on tax titles, p. 434.] Regarding the forfeiture to the Government as having become complete at the expiration of the sixty days, upon default, we have contended that these principles were applicable to the tender of payment before the sale; but as to such application to redemption *after* the sale, it seems there can be no reasonable denial. Now in this case the defendant in error claims, through a will, which gives the estate to his father until he, the said defendant, arrives at the age of twenty-one years. If the son lives until that time he has the estate, but if he dies before such time then the father has the estate, absolutely and in fee simple. The son became of age in the month of June following the sale, which took place in January, 1864. At the time of the sale the father claimed to be the owner, and the taxes have been assessed to him. The son, the appellee, offered to redeem in May or June, 1865, and then tendered the taxes, penalty, interest and costs, but declined to take the oath prescribed by the act of March 3, 1865, as he had been an officer of the rebel army until the surrender of Gen. Lee in April, 1865.

We claim that Hunter did not sufficiently comply with the terms of redemption, for the following reasons: It may well be doubted whether he is the owner contemplated by the act. He certainly was not the owner at the time of the sale. He had no vested interest, nothing more than a contingent interest, liable to be defeated by his death before his arrival at the age of twenty-one years.

The act says if the *owner* is a minor he may redeem by guardian, trustee, or other person having charge of his estate within two years after sale. At the time of forfeiture the father had the title, and one which might have become absolute on the death of his son. The plaintiff therefore comes in (if he comes in at all) within the provision of the clause which provides for the person having an interest who must be *loyal* and take the oath, and offer to redeem within sixty days after the sale. He was not loyal and did not offer to redeem within that time.

Second, the act provides that in case of a minor, the application shall be made by "guardian, trustee, or other person having charge of the estate." They are the only ones who can in such case redeem, and if within the two years the minor becomes of age they will still remain the guardian or trustee for that purpose—the purpose of redemption.

By the express terms of the act, having *had* charge of the estate at the time of forfeiture and sale, they would still be entitled to redeem, and through them must the redemption take place, whether it is attempted before or after the disability of the owner is removed. When the act says thus and *thus only*, in cases of legal disability, shall redemption be made, how can the courts uphold a redemption attempted in a different way? The same principle as to a strict compliance with terms of redemption apply to such redemption as to redemption attempted before sale, and heretofore referred to. If the plaintiff claims the privileges of a minor, he must appear in the character of a minor and act as a minor, through his guardian or trustee, as the act

prescribes. It will be observed that he was not a minor at the time of the application, and had not been for nearly a year. Sixty days after sale is all the time given to an adult person under no disability. He had been such an adult and under no disability for nearly a year. After such negligence to come in claiming the privileges of a minor, and then not coming in the way the law prescribes, he is not entitled to a very favorable construction of the law. If the person having charge of the estate suffers forfeiture and fails to redeem he is liable on his official bond for dereliction of duty, and the remedy of the person under disability is against such person.

Third, he declined to take the oath prescribed by the act of March 3, 1865.

It will be conceded that if this act of March 3, 1865, is applicable to sales made prior to that time, and that Congress had power to make them so applicable, then a failure to take such oath is a sufficient reason alone for holding, as in other cases, that the terms of redemption *after* the sale were not complied with. It being denied that such act is so applicable, and that Congress had such power, we must examine these questions. The oath required by this act as a condition of redemption is, that they have not taken part with the insurgents in the rebellion, or in any way given them aid and comfort, and they shall satisfy the commissioner that said oath is true. Whether the act applies to sales previously made cannot be determined, except by a close inspection of the act. It will be observed that it provides, first, that in all cases where sales *have been*, or shall be made, a writ of possession may issue for the benefit of the purchaser. Second, that in all such cases, after the period of redemption has expired, the President shall cause a patent to issue. Section 5 provides that in *all* cases expenses shall be paid out of proceeds of sale. Section 7 provides that in *any case where land is redeemed* the purchaser shall have his money refunded by the Government, provided, that the owner shall not be entitled to redeem unless he shall take this oath. This section is evidently speaking of nothing but what pertains to *redemption*. It says in *any* case in which land shall be redeemed the purchaser shall have the benefit thereof, provided, &c.

Will it be contended that in cases of sales made *before* that time the purchaser shall not have such benefit? Such a construction would be absurd. The whole act is speaking of sales which *have been*, or may thereafter be made. That it applies to *redemption* thereafter made is undoubtedly true, but a close examination of the act will show clearly and unequivocally that the intention was to apply this term of redemption to all sales, whether made before or after the passage of this act. Why was this provision enacted? Was it not clearly because Congress determined that the privilege of redemption, this *matter of favor*, should not extend to *those who had been in arms against the Government*. And what reason is there for making a discrimination between *such men*, who happen to have their lands sold after March 3, 1865, and those who had had them sold before? Why should the latter be entitled to privileges over the for-

mer. Let the *object* and the *spirit* of the act be consulted, and the intention cannot be in doubt. There could be no possible reason for such discrimination, unless it be that Congress did not have the *power* to make it applicable to sales made before that time. If they had the *power* they intended to do it, and did do it, and why should they not in one case as well as the other.

It is argued that by construing this provision as applicable to sales made previously it has a retroactive effect, and would thus be impolitic and unjust. Now it is difficult to see how it will be more retroactive in the case of sales made before than after the law. The oath applies to *past action* in the cases. If they had the *power* to prescribe such an oath at all, there is no reason why they should not make it applicable to sales made before as well as to sales made thereafter

The imputations made upon the policy and justice of the acts of Congress would apply as well by giving it the construction contended for by them as by giving it the construction contended for by us. Is the law unconstitutional by reason of any retrospective operation of the required oath? In 3 *Dallas*, 386, it is held that "Retrospective acts *divesting vested rights*, unless *ex post facto*, or impairing the obligation of contracts, do not fall within the prohibition of the Constitution, however repugnant they may be to the principles of sound legislation." See 1 *Kent's Com.*, 451; 2 *Peters*; 413, 8 *Peters*, 88.

It is argued that Congress had not the power after the sale to impose any new condition of redemption; that the privilege of redemption is a *vested right*, which should not be taken away except by process of law. Such a view entirely misapprehends the nature of the privilege of redemption. As we have already shown it is entirely a matter of favor. It is an offer made to the owner *voluntarily*, and no right is vested until such offer is accepted.

All that the owner has is a privilege of redemption, subject to the contingency of its being modified or changed, or taken away at any time, at the pleasure of the Government. Even if this be called a *right*, it is a right subject to such contingency, and known so to be by the party when he suffers the forfeiture. This offer can be entirely withdrawn, and the party cannot complain, because he knew or is bound to know that such is the right of the Government. This follows, as we have before shown from the completeness of the forfeiture, and the absolute control and ownership of the Government over the property, resulting from such forfeiture. By imposing this oath, then, the Government simply says, you shall not have the benefit of a favor offered by us *voluntarily*, and not yet accepted, unless you will show that you are not one of those who have been fighting against us. Having an undoubted right to dispense our favors to whomsoever and in such manner as we choose, we have made up our minds that we will not extend them to that class of men.

But, again, it is urged that such provision is *ex post facto*, because it, in effect, imposes a punishment for offenses previously committed. This results from the same misapprehension of the nature of the privilege. The withholding of a favor is not a punishment. Taking away a right or property might be a punishment, but this is not taking away any such

thing. This privilege can be taken away from an *innocent* man as well as from a guilty one.

The Government has consented to allow persons having certain claims, under conditions prescribed by Congress, to prosecute such claims in the Court of Claims. But to take advantage of this privilege the suiter must take an oath similar to this oath. Now has it ever been suggested that such a requirement was *ex post facto* or unconstitutional? Or would it be believed that no change or modification could be made of this oath by Congress? Not at all. And why? For the very obvious reason that the Government was not bound to allow itself to be prosecuted in any way, or at least in this way. It was not bound to have a Court of Claims at all. Every privilege of prosecution in this Court is therefore voluntarily accorded, and the Government can change its regulations as it chooses, take away a part of its jurisdiction or the whole of it, and abolish the court and its privileges altogether.

So it is with the privileges of redemption. They rest not upon any obligation, not upon any contract, until accepted, but entirely upon consent.

Here we see one great difference between this case and the test oath of attorneys in court. In the case decided by the Supreme Court, referred to by the counsel for appellees, there was held to be a vested right. Besides, it was held that the pardon of the applicant relieved him of all disabilities, and this being so, he could not be punished for his participaiion in the rebellion by being kept out of the privileges of the Court, a right which had before vested in him.

But, says the counsel, the appellee has received a pardon, and all his disabilities are thereby removed. To this we say, first: He did not have a pardon at the time he made his application for redemption, nor has he at any time since receiving his pardon offered to comply with the terms of redemption. Having no pardon, and declining to take the oath, his application was properly rejected, for he did not comply with the requirements of the law, nor did he have any pardon to excuse him from such requirement. At the time he got his pardon the two years had not expired, and why did he not make another application? This he should have done to have the benefit of his pardon.

Again, while a pardon may restore a man to all his *rights* it does not impose upon Congress the obligation to extend to him all their *favors*. Congress has seen fit to give bounties to certain classes of soldiers upon their making an application in the way prescribed and taking certain oaths. Would the requirement of this oath in such cases have been unconstitutional; and would the courts decide that a *pardon* would en title a man to recover such bounty without taking such oath?

Loyal men have to take this oath, but the counsel would place a pardoned rebel on a better footing than they. It can not be that it will be seriously contended that the pardon can have much effect in this case, not only because the appellee did not have a pardon at the time of making the application for redemption, but because, if he had, while he might thereby have been restored to all his *rights*, he did not thus become, against the will of Congress, entitled to the recipient of *favor* and to be excused from doing on his application for favors what all others are required to do.

It seems to me, therefore, that the commissioners committed no error, and that the judgment of the court below should be reversed.

I would ask the court to examine particularly the dissenting opinion of Judge Alexander Rives in the Court of Appeals of Virginia, to which I am indebted for many of the suggestions here offered, and which are therein better expressed and more ably sustained than I have been able to express and sustain them.

W. WILLOUGHBY,
Counsel for Pltff. in Error.

SUPREME COURT

OF THE UNITED STATES.

DECEMBER TERM, 1869.

HENRY M. BENNETT, AND HENRY S. MARTIN,

PLAINTIFFS IN ERROR,

AGAINST

ALEXANDER HUNTER, ROBERT BEVERLY AND EDGAR SNOWDEN.

POINTS FOR PLAINTIFFS IN ERROR.

New York:
SANFORD, CUSHING & CO., PRINTERS, 644 AND 646 BROADWAY.
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STATEMENT OF THE CASE.

THE present action was commenced in the Circuit Court of Alexandria County, Virginia. The plaintiff in error was summoned to answer the defendant, "in a plea that he is in possession of, and unlawfully withholds from him, a farm in Alexandria County, called 'Abingdon,' situated on the Potomac River," etc. It is brought to subvert a title derived by purchase from the United States, at a sale, under the act of Congress of June 7, 1862, "For the collection of direct taxes in the insurrectionary districts of the United States, and for other purposes," to lands which had been abandoned by the person now claiming them, who was at the time of the sale, and until the suppression of the rebellion, in the military service of the Confederacy, bearing arms against the Government of the United States.

The suit is brought into this Court from the Supreme Court of Appeals of Virginia, in which a judgment was rendered in favor of the claimant, in which two Judges concurred and one dissented. Both opinions are reported at length in the 15th volume of Grattan's Virginia Rep., p. 100.

The title assailed originated under the first of that series of financial measures adopted by Congress to provide the means of crushing the rebellion. On the 6th of August, 1861, Congress imposed a direct tax upon the United States of $20,000,000. The amount apportioned to Virginia was $937,550.06. The amount apportioned to the loyal States was promptly paid, and was in most cases assumed by the States themselves, without expense or delay of collection. Virginia and other States refused to pay their quota, and defied the efforts of the Government to collect it. They were in armed insurrection against the United States, had established a government, and put in operation their own systems of taxation. This insurrection was so powerful, and so unanimously sanctioned by the people of these States, and the civil authority of the United States was so far obstructed in Virginia, that this tax could not be collected. The territory where this insurrection existed became enemies' territory, and its inhabitants public enemies. (See Prize Cases in this Court.)

The act of Aug., 1861, having failed to secure the collection of the

tax in the revolted States for nearly a year, on the 7th of June, 1862, Congress passed an act, the title of which has been stated, applicable to all the districts in insurrection; the first section of which declares, in substance, that when in any State or Territory, or any portion thereof, the civil authority shall be so obstructed that the act of 1861 cannot be peacably executed, which States or Territories or portions thereof are to be thereafter designated by proclamation of the President, each parcel of the lands therein is charged by the act itself, without any farther process, with the payment of so much of said tax, and in such proportion, as the valuation thereof, according to the last assessment made previous to January 6, 1861, bears to the whole valuation of the land of the State.

Other sections provided the means of computing and collecting the tax, whenever the success of the National arms made it practicable, through Boards of Commissioners, to be appointed by the President, acting under the direction of the department of the Treasury, and prescribed their duties and authority. These Commissioners were to establish their office within the State for which they were appointed, to compute the amount of the tax charged against the lands collectively, which should be paid by each several parcel; they were to await its payment for a period of sixty days, and during this period the tax might be paid by the owner *or any one in his behalf*, and the lands discharged therefrom.

Up to this point the provisions of the act designed to operate upon a people in armed rebellion were as mild as the act of 1861, which applied to a loyal population. They were even more favorable. The delay of the year elapsed, was excused, and a farther period of sixty days given to perform the duty which the loyal States had already discharged; but if this leniency failed to secure the payment of the tax, more stringent measures were provided. The 4th section enacted that—

> "The title of, in and to each and every piece and parcel of land upon which said tax has not been paid as above provided, *shall thereupon become forfeited to the United States*, and upon the sale, hereinafter provided for, shall vest in the United States, or in the purchasers at such sale in fee-simple, free and discharged from all incumbrances, right, title and claim whatever."

The act then provides for the sale of the parcels of land upon which the tax has not been paid, prescribes the manner of giving notice and conducting the sale, and the distribution of the proceeds when paid into the National Treasury.

Other sections prescribe the manner and conditions by which the "*owner*," or "*loyal persons having an interest*" in the lands which have been forfeited, may be reinvested with the title thereto. Section 7 declares—

> That after advertisement, the Commissioners shall sell the same to the highest bidder, and shall issue to him a certificate of the sale, which shall be *prima facie* evidence of the regularity and validity of the sale, and shall not be impeached except by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to the sale, or that the property has been redeemed according to the provisions of the act.

The act also provides a system of redemption, and gives to the owner, or any loyal person having a lien upon the property, the privilege of redeeming it within sixty days after the sale, and in the case of minors, etc., a farther period was allowed of two years for redemption. A subsequent act imposed the farther condition that the person offering to redeem should take the oath that he had not been engaged in the rebellion, nor in any way aided or abetted the same.

More than a year elapsed after the passage of the act before it could be put in operation within any portion of the revolted territory. The President duly issued his proclamation, declaring this portion of Virginia and other localities in insurrection, and in August, 1863, a Board of Commissioners having been appointed previously, commenced the collection of the tax in the County of Alexandria. They executed the provisions of the act; the taxes upon these lands were not paid; they advertised and sold them under the law to the highest bidder at public auction on the 11th January, 1864, for the sum of $8,000.00, and gave the purchaser the certificate above described. The purchaser paid the purchase money, and the Commissioners paid it into the Treasury of the United States. Sixty days after the sale elapsed, the lands were not redeemed, the purchaser took possession of them, and by his tenants has since continued in possession. The plaintiff in error is the tenant of the purchaser.

The premises were formerly owned by one Hunter, who devised them by this clause in his will:—

> "I give to my brother Bushrod W. Hunter, until his son Alexander Hunter attains the age of twenty-one years, my Abingdon farm, in the County of Alexandria, together with all the horses, cattle, sheep, hogs, farming implements, household and kitchen furniture, and all the articles used upon

said farm and about the mansion house thereon; and on the arrival of the said Alexander Hunter at the age of twenty-one years, I give the said farm and other property to him; but if the said Alexander Hunter should not live to the age of twenty-one years, in that event I give the said farm and other property to my said brother Bushrod, in absolute right forever."

Alexander Hunter was a minor at the date of the sale. He became of age June 4, 1864. At the commencement of the rebellion, Bushrod and Alexander Hunter abandoned the property, fled beyond the rebel lines, entered the rebel military service, were bearing arms against the Government at the time of the sale, and continued to bear arms until the collapse of the conspiracy and the surrender of Lee. They then returned to the vicinity. Bushrod Hunter made no application to redeem the property. After the 3rd March, 1865, the claimant appeared before the Board, tendered the tax and penalty, but refused to take the oath that he had not been engaged in the rebellion. The Board decided that he had not complied with the provisions of the act, and declined to receive the tender. On the 4th Sept., 1865, the claimant received a conditional pardon from the President, which he accepted. The case shows no compliance with the conditions of the pardon, and no application was made to the Commissioners subsequent thereto.

After the premises were advertised, and before the sale, one Ware, who claimed to be a tenant in occupancy of a portion of the premises, "applied to the Commissioners to pay the tax and expense, penalty and cost; but the Commissioners refused to accept the same except *from the owner in person*, stating that they were so instructed by the Treasury Department." He made no tender or other attempt to pay the tax, nor does the case show that he was prepared to pay, or had any authority, whose tenant he was, or for whom he professed to act.

Certain questions arise in this case before it can be considered on its merits.

The action is either ejectment or unlawful detainer. The claimant, who has been divested of his legal title, if he ever had one, alleges that he offered to redeem the premises under that provision of the law which gave him two years' time, as a minor, and that the Board *wrongfully* decided against his right to redeem. He then commenced two actions—one, a petition in the Federal Courts for a *mandamus* to compel the Board to permit him to redeem; the other was the present suit in the State Courts of Virginia.

Upon these facts neither ejectment nor the more summary process of unlawful detainer can be maintained.

First. The statute has imposed upon the Board the duty, and invested it with the power of deciding whether the conditions of redemption have been complied with. If they decide affirmatively, they are to give the redemptor a certificate, stating the fact of redemption, which entitles him to the possession of the lands. The purchaser can only receive back his purchase money by producing this certificate, made by law the only legal evidence of the redemption.

The decision of the Board, then, is a judicial decision. *Pro hac vice*, it is a judicial body—a Court of the United States, deriving its powers from a law of Congress, having complete jurisdiction of the parties and the subject matter. The act, in certain cases, authorizes an appeal from its decision to the Federal Courts. Its decision must stand until it is reversed or set aside by competent authority.

Secondly. Such a proceeding would defraud the National Treasury, into which the purchase money has been paid. If the premises are redeemed, the purchaser is entitled to reclaim the purchase money. If this proceeding be sanctioned, the purchaser reclaims his money on the decision of a State Court, overruling the decision of a Federal Court, without notice to the Government.

Thirdly. In this action the claimant must recover, if at all, upon his legal title. Unless the certificate of the Board is void upon its face (and this is scarcely claimed), the claimant has no legal title. That title passed out of the owner by the forfeiture for non-payment of the tax. The legal title is either in the Government or the purchaser. The record is conclusive until it is set aside. He has a right to redeem if his view of the case is correct, which the record shows the Commissioners refused to permit him to exercise. That record is fatal to his action until it is set aside. As the case now stands, it is conclusive.

Fourthly. If it be claimed that the Board proceeded irregularly in selling the whole of the land, when a portion only would have

paid the tax, we reply: The necessity or propriety of selling the whole, and the practicability of a division, were equally questions for the decision of the Board. On this point the certificate of sale is conclusive. At all events, it cannot be set aside by a State Court in a collateral proceeding. The duty of the Board to sell the whole will be subsequently considered. In our view of the case, the claimant stands, at the best, upon an equitable title. To support his action, the record of the Commissioners must be wholly disregarded; and it cannot be disregarded if they have jurisdiction, even if the Court should consider their conclusion erroneous. The claimant should have prosecuted his petition for a *mandamus*, and set aside the record, before commencing the present action.

These questions are made because they are raised by the record, and not because of any indisposition to defend the act of June 7, 1862, and the amendment of 1865, in the full scope of their wise, just and constitutional provisions, none of which we believe to be open to legal objection or criticism. The Constitution has conferred upon Congress the power to *levy* and *collect* taxes. This language is broad enough to comprehend all known and impartial systems of taxation. Congress has the power *to collect* taxes; for the States, in terms equally comprehensive, have delegated to Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." In the words of Judge Rives, in the Court below, "the concurrent powers of the Federal and State Governments to impose taxes, and employ the usual agencies and coercion for their collection, have not been at any time called in question." The propriety of this concurrent power in the two Governments was discussed and settled before the adoption of the Constitution.

"The triumph of the friends of the Constitution, in securing this great fundamental source of all real and effective national sovereignty, was most signal. * * * * Without this power, the Constitution would long since, like the confederation, have dwindled down to an empty pageant."

1 Story's Com. Const., § 948.

"A candid review of this part of the Federal Constitution cannot fail to excite our just applause of the principles on which it is founded."

1 Tucker's Blackstone App., 246.

The power, then, of Congress and the States to *levy* taxes is concurrent and coextensive. It is a vital power. Without it the Na-

tional authority could not have resisted the recent assaults upon its life. And the power to make taxation available and productive is equally essential. If any State or district can, by any device, withdraw itself from and evade the exercise of this power, so that its persons and property shall escape their just share of the burdens of taxation, it can destroy the Constitution and defeat the intention of its framers.

The effect is the same if a State or district can effectually *impede* or *obstruct* the collection of taxes. Delay may be as destructive to the National existence as permanent refusal to pay the tax. In such a case the delay imposes an additional burden upon the loyal departments of the country, of which our recent experience furnishes striking examples. If these are too severe to be borne, the Government must fall.

These considerations demonstrate the value and necessity of the power of *forfeiture*, as applied to the property of the delinquent. It also is a power indispensable to the Government. Property must not escape its share of the cost of its own protection. It is held by its owner upon the implied condition that it shall bear its share of such burdens. If its owner refuses to pay his share of a just tax upon his property, he does not perform the condition, and *forfeits* his title. It is the right and the duty of the State to resume the possession of the property, and place it in the control of the loyal citizen who will discharge its obligations.

This principle, and the reason for it, is thus stated by Mr. Blackwell, in his treatise upon tax titles, p. 460:—

"Every owner holds his estate upon the implied condition that he will furnish a list of his taxable estate, and promptly pay its share of the common burdens assessed against the entire community; and if he omits to comply with the condition, the paramount authority of the State, which is entitled to enter for breach of this condition, comes in, as it has the right to do, and declares the estate *forfeited* for the breach of the condition."

This is precisely what was done by the act of June, 1862, the fourth section of which provided that, if the tax was not paid within the sixty days, "the title to the land should *thereupon* become *forfeited* to the United States."

This forfeiture must be *summarily* enforced. "If Government were necessitated to take the cautious and tedious steps of the common law, in giving personal notice, making up regular pleadings, and having a trial by jury, judgment and execution, it would cease to exist, for want of money to carry on its operations. Loss of

credit, and a total extinction of the National faith, the basis of al regular governments, must be the inevitable consequence."

McCorral *vs.* Weeks, 2 Overton's Tenn. Rep., 215.
Manning *vs.* Hoboken Co., 18 Howard Rep., 283.

How strongly these propositions are reinforced, when the owners of the property are in armed rebellion, and availing themselves of this neglected duty as a means to destroy the Government, requires no comment here. It can scarcely be necessary, after our recent experience in taxation, to cite authorities to justify the summary character of these forfeitures, or to show the instances in which they have been enforced or approved. Cases in point might be cited, as follows:—

Gaults appeal 93 Penn. R. 95
6 Missouri Rep., 64
State *vs.* Allen, 2 McCord's Rep., 56.
Livingston *vs.* Moore, 7 Peters' Rep., 469.
3 Dallas's Rep., 400; 4 Wheaton's Rep., 316.
1 Kent's Commentaries, p. 271.

The case at bar comes from Virginia. It may be well to inquire how this power of forfeiture was exercised by that State before its fall.

In 1785 the Legislature of Virginia passed an act containing the following provision: "In case the tax on any parcel of land within this Commonwealth shall not be paid for the space of three years, *the right* to such land shall be *forfeited and vested in the Commonwealth*, and it shall be lawful for any person to acquire a title to any land so forfeited in the manner prescribed by an act," etc.

This act contained no provision for redemption, except in the case of minors, insane persons or married women, who in certain cases might "save from forfeiture." It has been discussed by the Courts of that State without any suspicion of unconstitutionality (Kinney *vs.* Beverly, 2 H. & M.R., 318). Though in that case it was properly decided that the title did not pass, unless all the conditions were complied with.

In Wild's Lessee *vs.* Serpell (10 Grattan's Rep., 406), the following language is held: "That the provisions of our statutes passed from time to time, making it the duty of the owners of lands to pay all taxes properly chargeable thereon, and where they have been omitted from the books of the Commissioners of the Revenue, to cause them to be entered thereon in the proper counties, and to pay all such arrearages as shall be found not to be released by law, and in case of a failure to do so, *forfeiting to the Commonwealth all right and title whatever of the parties in default* (under the restrictions

provided by the acts), *are within the constitutional competency of the Legislature*, has been sufficiently affirmed in decisions which have been made during the present term of this Court, in cases arising under these several statutes. The same cases also sufficiently establish that, in order to consummate and perfect a forfeiture in such case, *no judyment or decree or other matter of record, nor any inquest of office, is necessary; but that the statutes themselves of their own force, and by their own energy, work out their own purpose, and operate effectually to divest the title out of the defaulting owner, and perfectly to vest it in the Commonwealth, without the proceeding of record, or any thing in the nature of an inquest of office.* And as the title is thus in a proper case divested out of the owner, and vested in the Commonwealth by the operation of the statutes, as where the forfeiture inures to the benefit of a third person claiming under the Commonwealth by virtue of another and distinct right, the transfer of the title to such person is in like manner perfect and complete, without any new grant from the Commonwealth, or any proceeding to manifest the transfer by matter of record or otherwise. Upon these subjects I have therefore nothing farther to add upon this occasion, except that, considering the peculiar condition of things in that part of the State lying west of the Alleghany Mountains, and the serious check to population and the improvement of the country, and the development of its resources growing out of it, *a resort to the stringent measures of legislation that were adopted was, in my opinion, as wise and expedient as the constitutional power of the Legislature to enact them was clear and unquestionable.*"

See also Staats *vs* Broad, 10 Grat. Rep., 400.

Our conclusion then is, that it is competent for the Government, under suitable laws, to forfeit the title of the owner to lands upon which taxes legally assessed have not been paid, *without any privilege of redemption whatever;* and that his title to them is completely extinguished by such forfeiture.

But it may be claimed that a distinction exists in this respect between the powers of the State and the National Government; that the former, possessing the right of eminent domain, may declare forfeiture and resume the title, but the latter, never having held the title, cannot acquire it by forfeiture, but is restricted to other means of collection. This distinction cannot be maintained.

1. We might well rely upon the constitutional provision by which the States have conferred upon Congress the power to levy and collect taxes, and to pass all laws proper and necessary to exe-

cute that power. This power is unrestricted in terms, and it must confer upon Congress authority to employ every proper method of securing the collection of a tax which could be used by a State. The only restriction relates to the purpose for which taxes may be assessed. The power to "levy and collect" is concurrent and coextensive in the States and Congress. Such was the construction of the framers of the instrument.

See Federalist, Nos. 32, 36.

It has been the construction of the commentators.

See Story on the Const. § 943; and Tucker's Blackstone, above cited.

2. Forfeiture, as a means of coercing the payment of a tax, had been employed by Virginia before the adoption of the Constitution. (See her act of 1785, above cited.) It is the most effective—it may be the only means to make a tax available. Taxation assumes that the owner of the property will perform the duty of payment. It would be unavailable if it could only be enforced by legal process or a sale of the property, with their attendant delays. If its owner is required to pay the tax by a fixed day, in order to preserve his property, payment is more promptly assured than by the use of all other powers collectively.*

* The Court below, in order to defeat the purchaser's title, was forced to deny to Congress the power to forfeit lands for the non-payment of taxes. This conclusion was reached upon the ground that the power of Congress in this respect is inferior to that of the States, because it was the intention of the framers of the Constitution to confer upon the General Government a restricted and limited grant, and not a power coequal and concurrent with that possessed by the States.

The exigencies of the case will scarcely warrant the consumption of time in the discussion of this question of *intent*, when the words of the grant are unambiguous. But the question is one of some historical interest, and is not difficult of solution.

The history of the Constitution shows that this grant was the subject of more discussion and hostility than any other. The opposition to it was placed upon the ground that the powers it conferred were "unconfined," "unlimited," "concurrent," and coequal with those of the States. Judge Mason, in the Virginia Convention, declared that, "being at discretion and unconfined, it must carry every thing before it." Others claimed that being "concurrent" with that of the States, both could not be exercised, and the National power, being the greater, would prevail. Mr. Smith, in the New York Convention, insisted that, the "objects of taxation being unlimited, there can be no bounds set to their (Congress) powers. They have the right to seek those objects by all necessary laws, and by controlling all subordinate powers; the General Government must have complete control over every obstacle to their operations." Mr. Williams said, "under the clause, 'pass all necessary laws,' &c., *Congress may pass any law they think proper*. True, the 9th section controls the power to certain objects, but Congress has power to levy and collect taxes, and there is no limit to the exercise of this power."

The right of the sovereign power to enforce forfeiture against a subject who holds lands upon a condition which he refuses to perform is essential to its existence. The prompt payment of taxes may be indispensable to its life. Delay for months and years may be as fatal as refusal. This is especially true when the people of any considerable portion of the National territory abandon their allegiance, and engage in armed revolt against their Government. Withholding taxes, delay in their payment, weakens the Government, and becomes as injurious as actual warfare. The loyal sections must not only bear their increased burdens, but those of the defaulting rebels are added to them. May not the Government terminate this state of things, if it has the strength to do so? We insist that when a tax has been properly imposed, notice given to pay it, and the owner neglects or refuses to comply, and engages in armed rebellion, it is entirely competent for the Government to give the defaulting rebel the alternative to return to his allegiance and perform his duty, or to submit to the forfeiture of his property, and allow it to be placed in the possession of a loyal citizen who will thereafter perform his neglected duty.

We next proceed to consider the construction of the act of June 7, 1862, and its application to the present case.

We suggest that if the power to enforce the collection of a tax by forfeiture exists under the Constitution, Congress must be the exclusive judge of the necessity and propriety of its exercise. Its decision of that question cannot be revised in a judicial proceeding.

But it is well to keep in mind the condition of the country when the act was passed, and the circumstances under which it was put

To this Mr. Madison replied: "Where is the evil of its being a power of taxation *concurrent* with the States? Does the concurrent collection of taxes imposed by a State for general purposes, and levies made by counties for county purposes, produce any inconvenience? I concur in opinion with those gentlemen who hold that this power is essential to the salvation of the Union."

The friends of the clause uniformly conceded the correctness of this construction, and claimed that the power thus unlimited was indispensable. In the whole discussion, as well in the State as the National Conventions, not a suggestion is to be found that the power of Congress to enforce the collection of taxes is not concurrent, coequal and coextensive with the power of the States, or that any limitation can be imposed upon its exercise.

See remarks of Mr. Madison, 3 Elliot's Debates, 96, 256, 257, 248, 306, 329; of Mr. Marshall, *ibid*, p. 246; of Mr. Mason, *ib.*, 29, 263; Gov. Randolph, *ib.*, 116, 121, 207; Mr. Hamilton, 2 Elliot's Deb., 361 and 362; and for the views of other members, 2 *ib.*, 331, 377, 444, 466; 3 *ib.*, 73, 75, 79, 87, 89, 191.

in operation. Virginia had refused to pay her quota of the tax of August 5, 1861. She was in armed rebellion—her people public enemies, who, with their associates, held forcible possession of one-third of the National territory, including portions of Alexandria County. The only portion of the territory of Virginia east of the Alleghanies in which the National authority could be exercised was the portion held by our armies. The inhabitants had abandoned their property, fled beyond the rebel lines, and those capable of bearing arms had entered the military service of the rebel organization, which had established a government *de facto*. When the act was passed, there was not a county of the territory declared in insurrection by the President's proclamation in which it could be executed. The entire resources of the Government were employed in the National defence, or in its efforts to suppress the rebellion.

The act of 1862, then, was designed to collect a tax among a people who not only denied owing any duty to the United States, but who had renounced their allegiance, and defied all efforts to compel them to return to it. It was to be put in operation when and where our armies had cleared the way. The officers under it were to enforce it in the presence of the army. Coercion was alone relied upon as a means of collection.

In August, 1863, the success of the National arms for the first time enabled the Government to put the act in operation. Collection was first attempted in Alexandria County. The Commissioners opened their office, assessed and apportioned the tax, gave the required notice of their readiness to receive it, and awaited its reception for sixty days.

There was no offer or effort made to pay the tax in question by the claimant, for he was a soldier in the rebel army—by his friends, for they denied the authority of the Commissioners, and defied their power.

Up to this point there is no complaint against the tax, or claim of irregularity in the action of the Commissioners. Up to this time the only objection made is against the constitutionality of the law. The tax was not paid, and the "forfeiture" demanded by the law transpired. "*The title of, in and to each and every piece or parcel of land upon which said tax* (has) *had not been paid as herein provided* (shall) *thereupon become forfeited to the United States.*"

"The title became forfeited to the United States." This expression has a legal meaning which must control the rights of the parties.

Etymologically, "forfeit" (Latin, *forisfactura*) is a transgression, a crime; and "forfeiture" is defined by the philologists to be "*the*

loss of property, right or office, as a punishment for some illegal act or negligence."

The legal meaning of forfeiture is defined by Blackstone to be "a punishment annexed by law to some illegal act or negligence in the owner of lands, etc., *whereby he loses all interest therein*, and they go to the party injured as a recompense for the wrong which either he alone or the public together with himself hath sustained."

2 Bl. Com., 267.

"It is the law (remarks Judge Kent), that the State, on taking lands by escheat, or even by forfeiture, *takes the title* which the party had; none other."

4 Kent's Com., 427.

In Great Britain, where all lands were originally held subject to the condition of allegiance to the Sovereign or Lord paramount, a breach of the condition was held not only to divest the tenant of all right, but to cut off the entail, as well as the rights of all claiming under him. It having been doubted by some judges whether the estate of inheritance passed by forfeiture, the statute 26 Henry VIII. was passed to settle the question. The King held the forfeited estate discharged from all incumbrances.

Here the National authority replaces the Sovereign. "I have always held (says Judge Tucker, in Kinney *vs.* Beverly, 2 Hen. & Munf. Rep., 333), that from the period of our Revolution, the Commonwealth succeeded to the political character of the King in all cases whatever, and that its rights, privileges and remedies were, in general, to be ascertained by the political character of the King, where the same were not controlled or enlarged by the express terms of the Constitution or laws."

By this forfeiture, *something* was lost to the owner and passed to the United States, *eo instanti*, the expiration of the sixty days. The statute declares that it was "the title to the land." In other words, the legal property of the owner passed out of him and into the United States, never to be restored except in the manner prescribed by the act itself. Had no sale ever been made—had the proceedings ended at this point, the legal title of the owner would have been equally extinguished. We adopt the language of Justice Rives in his opinion in the present case: "It does not admit of a doubt that the forfeiture is absolute and unqualified, and is not in any wise modified or restricted by the latter provision for vesting the title. The question is asked, why postpone the vesting of the title to the

sale if it was already in the United States by reason of the forfeiture? I answer, because the forfeiture puts it in the United States as Lord paramount, and for the purpose of a sale, to raise the taxes, and the vesting of the title pertains to its other character as a purchaser at its own sale."

It will be argued, however, that the title does not pass out of the owner in any case of forfeiture alone, without inquest of office, or some proceedings of record which determine the nature and extent of the forfeited estate.

It is true undoubtedly that in some cases this inquest is necessary. Where crime is the cause of forfeiture, the crime must be judicially established. The words "shall forfeit" have been held only to confer a right to enforce forfeiture, and so have other words which contemplate action in future by the Sovereign or party receiving the forfeiture. In such cases the title is not divested until such party enforces his rights by a proper inquest or proceeding. All the cases in which it has been held that the title has not been divested by the event which lays the foundation of the forfeiture, are of this class.

But whether inquest of office or any other proceeding is necessary to divest the title, must be determined in each case by the law itself. Here the statute directs that if the taxes are not paid, the title *thereupon* shall *become* forfeited. Nothing further is required. The case is brought within the other class of completed forfeitures to which the following authorities refer:—

Buckley *vs.* Osborne, 8 Ohio Rep., 180.
Hanna *vs.* Smith, 15 Ohio Rep., 134.
Usher *vs.* Pride, 16 Grattan Va. Rep., 190.

A legislative act, directing the possession and appropriation of land, is equivalent to office found. The mode of assuming or asserting the forfeited grant is subject to the legislative authority of the Government. It may be after judicial proceedings, or by taking possession directly, under the authority of the Government, without these proceedings.

U. S. *vs.* Repentigny, 5 Wal. Rep., 211.

Whether our construction of this clause is correct or not, *the land was sold.* We are next to consider the legal effect of the sale and the objections urged against its validity.

The liability of the land to the tax, its non-payment, the notice and sale in conformity with the act to the highest bidder, payment of the price by the purchaser, and the issue to him of the certificate of sale, are admitted.

The statute makes this certificate the evidence of the purchaser's title, and declares *that it shall not be impeached except by showing that the property was not subject to the tax—that the tax had been paid, or the lands redeemed.*

Is this enactment valid, or is it void?

That the Legislature is competent to change the common law rules of evidence, and declare that the deed itself shall be received in all courts as *prima facie* evidence that all the provisions of the law have been complied with, thus shifting the *onus probandi* from the purchaser to the claimant, is decided in 16 How. Rep., 472.

Such deed may also be conclusive evidence.

18 Ohio, 400.

Hubley v Keyser 2. Penn St. R. 496.

An act of Virginia of Feb. 9, 1814, directs the sheriff to execute a deed to the purchaser. Sec. 38 provides that after the time of redemption has expired, the regularity of the proceedings under which the purchaser claims title shall not be questioned except for reasons appearing on the face of the proceedings.

This act was fully sustained in Flanagan *vs.* Grimmett (10 Grattan Rep., 421), where it was held that the deed need not recite the proceedings. "The 38th section of the act of 1814 restricted the party to irregularities appearing on the face of the proceedings, not even permitting the contesting party to look beyond the proceedings, and prove by evidence *aliunde, though that might be the sheriff's receipt for taxes, that the taxes had been regularly paid;* for it is expressly provided that after the time for redemption, the arrearage of taxes for the non-payment of which the land was sold should not be denied."

It is somewhat remarkable that every judge in Virginia before whom this case has been tried, except Judge Rives, who sustained the validity of the certificate to the full extent claimed, have given no effect to this provision. From their opinions its existence would scarcely be inferred. It was necessary to ignore it in order to defeat the title of the purchaser.

Now, aside from the want of constitutional power, there is not a ground of objection urged against the regularity of the sale and

the validity of the title which is not expressly prohibited and cut off by this proviso. This brings us to the consideration of these objections. They are two in number:

1. That the Commissioners sold the whole of the land; it was "susceptible of partition, and a part might have been sold to have paid the tax."

2. "That after the advertisement of the sale of said premises referred to in said certificate, and before the sale was actually made, Charles A. Ware, then 'a tenant in occupation of about half of said premises,' applied to said Tax Commissioners to pay the tax and expense, penalty, costs and interest, &c., upon the property; but the Commissioners refused to accept the same, except from the owner in person, they stating that they had been so instructed by the Treasury Department."

These objections are cited *verbatim*, because they are quite too loose and imperfect to entitle them to consideration. The first states a possibility. There is no material substance that is not susceptible of division—no fraction of value that may not be sold. The land was in a single parcel—a farm, with its suitable proportions of different soils, of forest and meadow. That one part might be sold without injury to the other—that it was reasonably practicable to divide it at all, is not shown or even suggested. The law presumes that the Commissioners performed their duty.

But had the Commissioners power to sell less than the whole parcel?

Now there are authorities for the proposition that a collecting officer, whether of execution or taxes, is ordinarily restricted to the sale of enough of the debtor's property to satisfy the demand. The case is doubtless the same where the act is *silent* as to the amount to be sold. We may go farther and admit that where the collection of a specific amount of money is the sole object of the process, all intendments and presumptions should be in favor of restriction. And this for an obvious reason which needs no authorities for its support. "The collection of a given amount of money is the primary, the only object of the process, and if its operation is to be extended farther, it must be in virtue of some affirmative and clear exercise of the legislative power." Such are all the cases upon this subject decided by the State and Federal Courts.

And even in these cases when the estate consists of a single parcel, as in the case at bar, the legal presumption is in favor of the regularity of the acts of the officers. If a portion of the estate can-

not be sold without injury to the residue, they must sell the whole. It is for the party complaining to show affirmatively that they have exceeded their powers. It is not shown here either that the division was *practicable*, or that a portion could have been sold with less injury to the claimant than he would have suffered by the sale of the entire estate.

But we should stultify the legislative power by the admission that in this respect the State is open to doubt or question.

The statute, in *letter* and *intent*, directs the sale of the whole estate, and the authority is not conferred for the sale of any less quantity.

The act of Aug. 1861, expressly limited the power of sale to "so much of the estate as may be necessary." It failed to produce the tax.

In the act of June, 1862, these words are supplied by the following:—

Sec. 2. Charges the tax upon "every piece and parcel of said land."

By Sec. 4. "The title to every piece and parcel of said land shall be forfeited," &c.

By Sec. 7. If the taxes upon *said* lots and parcels are not paid, *the same* shall be advertised, and the Commissioners shall cause "*the same* to be *severally* sold," &c.

Language could not more clearly direct the sale of the entire estate. In the words of Judge Rives, here is "the broad and peremptory order for the sale of the 'said lots and parcels of land,' without any limitation whatever as to the quantity. The Commissioners are left no discretion, as in the first act, touching the quantity to be sold, but were required by Congress to sell all that was assessed to the delinquent. The sales were just such as were required by the act, and if excessive or unnecessary according to our view, must be deemed to have received the deliberate approval of Congress. I cannot therefore acquiesce in the propriety of vacating the sales, though conformable to the act, because of the practicability of reconciling the enforcement of the taxes with a more indulgent mode of proceeding."

Nor is this all.

The objection is based upon the theory that the sale was limited to the production of the tax, penalty and costs.

The production of a *greater sum is the condition precedent to any sale at all.* For the 7th section directs the Commissioners to strike off the parcels "severally" to the United States for the amount of

the tax, penalty, costs and interest, unless "some person shall bid the same *or a larger sum.*"

The Commissioners may extend their bids to two-thirds the assessed value.

The act and its amendments, after providing for the payment of the proceeds into the Treasury, expressly provides for the distribution of "the balance above the tax" to loyal creditors. See acts of 1863 and 1865.

The right to sell the entire property, and the propriety of its exercise, may be supported by higher considerations, though this field of discussion cannot be opened unless the Court decides to revise the judgment of Congress upon the propriety of the exercise of one of its constitutional powers.

May Congress impose any *penalty* for the non-payment of a tax? Is its power in this respect limited? How, and where?

We maintain this right, which has been exercised in every statute imposing a tax which has emanated from Congress; and we also suggest that Congress is the exclusive judge of the necessity of its exercise. It may say that the penalty shall be the interest on the tax; shall be 5 per cent.—50 per cent.—a sum equal to the value of the land—*the sale of the whole land!*

The sale of the entire estate is as legitimate a *means* of inducing or coercing the payment of the tax, as the imposition of any other penalty.

If the power exists in any case to sell the entire estate, will the propriety of its excuse be questioned here, under a law which can only be enforced when the military power has cleared the way, upon a people who deny the authority which enacts it, and who are seeking to overthrow it by force of arms, and against whom the usual and normal legislation for the collection of the tax has proved ineffective?

In an action to set aside a tax sale in one of the States because the premises were sold as one lot, when they had been divided into several, and it appeared that they consisted of a block, and had been assessed as a single parcel, it was held that the assessment was conclusive, and the collector had no authority to sell less than the whole.

Marston *vs.* Doran, 10 Minn. Rep., 67.

The application made by Ware, after the default and before the sale, cannot affect the purchaser's title.

The artificial language in which this transaction is described subjects it to grave suspicion. If the claimant asserts that it amounts

in law to a payment of the tax, the *onus* is upon him to show that Ware was a person who could legally make the payment or the tender, or that the nature of the transaction excused both tender and payment. He shows nothing of the kind.

The case states that Ware was a "tenant in occupation" of a portion of the land, but whether tenant of Bushrod or Alexander Hunter, or any one else, is not shown. What kind of a tenant? For years? at will? by sufferance? as a squatter on vacant lands? The case is silent. The Hunters had been absentees since April, 1861, within the rebel lines, holding no lawful communication with the property, or any person in relation to it. It is not even stated that Ware was in *possession*. That term might imply some species of *right*. He was in "occupation"—a term quite consistent with his being there as a trespasser, without color of right, and against the owner's will. If he had been a tenant having any legal interest, no matter how slight, he could have redeemed, but he made no attempt at redemption. We have the right to say, upon this statement, that he found the land vacant, entered into his occupation without any communication with the owner, and without even color or claim of legal right or interest.

What did he do? He "*applied* to pay." He did not tender payment, or *offer* to pay. Had he done so, the fact would have been stated. This relation is entirely consistent with the fact that he came to the Commissioners and made the inquiry, "Will you allow me to pay the tax?" To which they replied, "The Treasury Department instructs us to receive payment only from the owner in person, and we do not consider you the owner."

He did not claim to be an owner, to act in the owner's behalf, to have any interest in the land, or any right to make the payment. He produced no evidence of the character of his occupation. The Commissioners had no knowledge that he had an occupation. *It is not shown that he had the money, or even the ability to make the payment.* The Commissioners were public officers. Their acts bind no one unless they are strictly within the scope of their authority. Their general conversation with a stranger cannot defeat the purchaser's title.

To lay the foundation for this objection, it must appear affirmatively that Ware claimed to be in *rightful* possession; that the Commissioners were informed that he had some right; that he had the money within his control to pay the tax; and that he either made the tender or would have done so but for the statement of the Commissioners. The fact that, on these material points, the case is

silent, and that he made no effort to redeem the property after the sale, especially when the circumstances are considered, has its own significance.

It is true that, in ordinary cases between debtor and creditor, where the debtor has the money present and in his control, and is ready and willing to pay it, and the creditor refuses to receive it, the law excuses the debtor from the act of showing the money and making a formal tender. But this is upon the ground that the act would be nugatory. In such a case the debtor must always show that he had the money, was willing to pay, and would have paid but for the declaration of the creditor.

Whether the rule applies to a public officer whose duty it would be to receive the money in such a case, we need not inquire. But it would seem a dangerous precedent to hold, even in that case, that the Government was bound, and that the willingness to pay, and refusal of the officer, amounted to payment.

But could Ware have paid the tax upon any state of facts which can be suggested?

The statute answers this inquiry. By the act of 1862, the right to pay the tax terminated at the end of the sixty days. The land was then to be advertised and sold, after which the right of redemption accrued. But between the advertisement and sale there was no right of payment in any one. The amendment of 1863 enlarged the privilege of *the owner*, and allowed him, during this intervening period, *to appear in his or her own proper person* and pay the tax, with 10 per cent. interest.

The statute names three distinct classes of persons:

1. The "owner," in general terms, without any restrictive or descriptive words, may pay the tax within sixty days.

2. Between the advertisement and sale the payment can only be made by "the owner in his or her own proper person."

3. The "owner," or "any loyal person having a lien on the lands," may appear in person and redeem by taking the oath.

Thus "owner" and "person having an interest" are used distributively, and not synonymously, throughout the act; and when the act restricts the payment to the owner in his own person, it is not easy to see how it can lawfully be made by a person who was only a tenant in occupation of a part of the premises under the circumstances developed by the case. As remarked by Judge Rives, "*We do not see how any one can cavil about or misunderstand these terms.*"

We are perfectly aware that in many cases the term "owner,"

referring to a class who may pay taxes or redeem lands sold for taxes, has received an enlarged and liberal construction, and has been extended far enough to include "persons having an interest." It was so extended in Dubois *vs.* Hepburn, in this Court, and there are many analogous authorities.

Now these cases all furnish their own reasons for the enlarged construction. The statutes involved are all applicable to a normal condition of society—to be carried into effect among loyal citizens—having no object beyond the payment of the particular tax in question. The term "interest" implies an owner; there can be no interest which some one does not own; and there being no other terms used in the statute showing the use of the word "owner" in *a restricted sense*, it is properly held to be *the intention of the Legislature* to use it in the enlarged signification.

But the meaning of "owner" in this connection *is always construed according to the intention of the enacting power;* and in every case that can be found where the intention is clear to restrict it to the person having control of or dominion over the property, it is so restricted.

"It is confessedly the duty of the Court to require satisfactory evidence of a right to redeem."

Masterson *vs.* Beasley, 3 Ohio Rep., 301.

The construction is placed upon the word owner, because, as said in Dubois *vs.* Hepburn, "it comports with the words and spirit of the law."

We do not understand that the power of Congress to restrict the payment is denied. The claim is, that the term owner has not been restricted, and that the payment of the tax may be made even by a stranger; that (using the words of Judge Joynes in the Court below) "If the money is paid, *no matter by whom*, before the sale is made, the reason for making the sale ceases, and the authority for making it ceases also."

The act of August, 1861, authorized the payment to be made by "the owner, or any one in his behalf." The present act requires it to be made by "the owner in his own proper person." The term "owner" is used in one sense; "any person having an interest" is used in another. The owner redeeming "must take the oath to support the Constitution," and that he has not been engaged in the rebellion. The act is to be enforced in a State in rebellion when it was passed; a country which has been abandoned by its inhabitants, who have entered the military service of the rebellion, leaving their property unproductive and decreasing in value, at a

period when every resource of the nation was employed in the effort to conquer a peace; when every rebel who could be persuaded or induced to his allegiance was a soldier lost to the opposing army, and every farmer brought back to his farm was an increase of the productive property of the nation, aided in reducing the burdens which were crushing out the National life, and increased the National strength to bear future burdens. Now, to say that in such legislation Congress, when it declared that a tax should be paid only by the owner in his own proper person, *intended* that the tax might be paid by any person unlawfully sent through the lines, as the agent of the commander-in-chief of the rebel army, we think, debases the intelligence of the National Legislature, and defies all principles of judicial construction.

If it were necessary to pursue the argument, it might be said that the statute itself confers a power upon the owner which it *refuses* to a loyal person having an interest. The owner may redeem *before the sale, without taking the oath—without paying the penalty*—by paying only 10 per cent. interest from the levy—*without even taking the oath;* but these privileges are granted to him alone. But the "person having an interest" must be loyal—he must take the oath—he can redeem only after the sale—he must pay the penalty—he must pay interest at the rate of 15 per cent. from the date of the President's proclamation. The distinction between an owner and a person having an interest could not be made more explicit by any change of terms.

We are not now discussing the *power*, but the *intention* of Congress; and the question is, whether the intention is not apparent in this legislation to make the statute useful in inducing a return of these owners to their allegiance.

But if the act of Ware amounts in law to a tender of payment, and the Commissioners erred in selling the entire estate, the question still remains, can these facts be shown to impeach either the regularity of the proceedings or the validity of the purchaser's title?

There is no subject of State legislation more general than that of quieting titles derived from tax sales. There is perhaps no State in the Union which has not legislated to this end; certainly, none which has passed so many acts on the subject as Virginia. These acts present the subject under various forms. They change the burden of proof—declare evidence conclusive which is ordinarily *prima facie*—make the recitals in the deed, and the deed without recitals, evidence of anterior proceedings, and in some cases unimpeachable evidence of title. They give the same effect to lapse of

time, to sales, and various other proceedings, and have ordinarily been enforced without a question of their constitutionality.

Parker *vs.* Overton, 18 How. Sup. C. R., 137.

What would be the effect of a statute which made the deed conclusive in all cases, and excluded the owner from proof that the land was not subject to taxes, for example, we have no occasion to inquire. If the owner was precluded, without any omission or fault, and without notice from showing that he had not neglected or had performed his duty, by the terms of the act there would be reason for holding that he was improperly deprived of his property.

But even in such a case, the Courts of Virginia have upheld the statute. The 38th sec. of the act of 1814 restricted objection to the purchaser's title to irregularities appearing on the face of the deed; and the Court below held that the contesting party could not look beyond the deed, even if he "could show the sheriff's receipt for the payment of the taxes."

Flanagan *vs.* Grimmett, 10 Grat. Rep., 435.

And the decisions of the Virginia Courts ought to be conclusive in the present case.

But when the statute leaves the owner free to show that the property was not subject to taxation, that the taxes had been paid or the lands redeemed, and declares that in all other respects both the regularity of the proceedings *and the validity of the sale* shall be conclusively proved by the production of the deed, we venture the assertion that the power of the Legislature to enact it has never been questioned by any Court whose decisions are entitled to consideration, and for the reason that such a statute depends wholly for its operation upon the act, or the neglect of the owner.

In fact, the power of Congress to pass such an act was not denied in the Court below. Judge Joynes declares, "I am not now questioning the power of Congress to declare that the certificate of sale shall, as between the owner and the purchaser, be conclusive as to the necessity or propriety of selling the quantity of land actually sold, etc., but the power of Congress to declare that in every case the whole land shall be sold."

There is a class of cases (New York furnishing many) in which the act declared the deed conclusive as to the "regularity of the *sale*," where the Courts have properly held its effect limited to the mode of conducting the sale, and that it did not dispense with proof of the other elements of a valid title. There are other cases in which the Courts have intimated that if the statutes precluded

the owner from showing that the land was not subject to taxes, they would be inoperative. These furnish no occasion for criticism.

And there is another class, like Flanagan *vs.* Grimmett, which decide that where the act leaves the owner free to prove that his property was never subject to the tax, or that the tax had been paid or the land redeemed, in all other respects the deed shall be conclusive both of regularity and validity of sale and title; it is not open to constitutional objection. Such are—

Gwynne *vs.* Nieswanger, 18 Ohio R., 88.
Battison *vs.* Budd, 17 Ark. R., 656.
Rinehart *vs.* Schuyler, 2 Gilman's Ill. R., 556.

Mr. Blackwell, in his work on tax titles, intimates a different opinion, and questions these cases on the authority of Garret *vs.* Wiggins (3 Scammon's Ill. Rep., 335). We are confident that he has misconceived the reason of both classes of cases, and has failed to notice that the first class are decided upon the construction of the word *validity* as contrasted with the regularity of the sale.

And in Garret *vs.* Wiggins (the only case cited by Mr. Blackwell to support his criticism of Rinehart *vs.* Schuyler) our view of the extent of the legislative power is maintained. It is there stated that "*It is admitted* that it is competent for the law-making power to change the rules of evidence, and to declare that from the proof of certain facts others shall be presumed. This statute has done so to some extent; under it several preliminary facts to a legal sale by the auditor are inferred by the conveyance, and the responsibility of proof shifted from the purchaser to the owner. But *the publication of notice of sale is not one of these facts* inferred from the deed, nor is the proof thereof thrown upon the former owner." The Court construes the statute according to the intent of the enacting power.

It would seem safe for a purchaser to rely upon the obvious distinction between the cases in which Congress has the power to make a tax-deed conclusive, and that in which the power is restricted, without looking into the authorities. Is not this distinction clear? Did not Congress recognize and preserve it in the present law?

There are two classes of cases to which this power ought not to extend: *First*, where there has been no default and the jurisdiction never attached, as where the land was not subject to the tax. *Secondly*, where the lien, though once existing, has been discharged, whereby the jurisdiction has been taken away. In these cases the objection goes to the *jurisdiction*.

But where the liability to taxation is admitted, and the tax has

not been paid or the land redeemed, the objection to the validity of the deed must, of necessity, rest upon some fault or irregularity in the proceedings which might have been cured, or by reason of which the sale might have been prevented, or the Commissioners be compelled by proper proceedings to discharge the lien. In such cases there is no restriction upon the legislative power to say that the objection shall not be raised in a particular way. The deed is made like a record—conclusive until set aside. It cannot be collaterally questioned.

Suppose the act, which requires the lands to be advertised, declares that the deed should be conclusive evidence that they had been—would not the record be conclusive everywhere, except in a proceedings to set it aside?

Applying these principles to the present case, we find that the lands were subject to the tax. It was properly assessed, remained unpaid for sixty days, the jurisdiction attached, and the lien, at all events, was created. Ample time was given to discharge it. The owner made no effort to do so. Reasonable time is given for payment, and after that for redemption. The owner neither pays nor redeems.

The jurisdiction attaches both over the land and the owner. It is not taken away by payment or redemption. The Commissioners sell, receive the purchase money, and execute the deed. They make up their record. No effort is made to set it aside, or compel the Commissioners to perform any act which, it is claimed, they have omitted.

The claimant now asserts that the deed is void, because the Commissioners sold the whole, when they ought only to have sold a part, and because Ware would have discharged the lien but for the refusal of the Commissioners to allow him to do so. The act declares that the deed in these respects shall not be impeached.

We think that Congress had the legal power to enact it.

It has not hitherto been claimed that it was not the intention of Congress to make the deed conclusive of such objections. Such a claim, if made here, cannot be maintained.

The act makes the deed "evidence *of the regularity and validity of the sale and the title of the purchaser*," and declares that "it shall not be affected as evidence of the *regularity and validity* of the sale," except by showing that the lands were not liable to taxation," &c.

A sale cannot be *valid if it is void*, though it may have in every respect conformed to the statute, and therefore have been "regular."

A title cannot be "valid" *if it is worthless*, though on the face of the deed there may be no irregularity. The language of the act clearly shows the intent of Congress that the deed should conclude the parties, except in the three respects named.

In every reported case on the subject, this distinction between the regularity of *the sale* and its *validity* has been recognized and enforced. See authorities above cited, and especially

Gwynne *vs.* Nieswanger, 18 Ohio R., 88.
Rhinehart *vs.* Schuyler, 2 Gilman's R., 556.
Flanagan *vs.* Grimmett, 10 Grat. R., 435.
Stewart v Shoenfelt 13 Serg. & Rawle 360
Thurston v Prendergast 14 How 346

If these propositions, or any of them, are correct, the claimant cannot recover unless the lands *have been redeemed* in conformity with the act.

That the case shows no redemption was held by all the Judges below, the majority subverting the purchaser's title exclusively upon the illegality of the sale of the whole parcel, and the effect of Ware's application.

These are the conditions of redemption :—

1. The owner or lien-holders may redeem, by payment and swearing allegiance within sixty days after the sale.

2. By the *amending* act of March 3, 1865, in force when the offer to redeem was made, these persons must also take the oath that they have not engaged in rebellion.

3. If the owner has been prevented from payment or redemption by the rebellion, he may have a year within which to apply to the Commissioners to redeem, upon giving the purchaser notice. *From their decision an appeal lies to the Federal Courts, which, in certain cases, have original jurisdiction of the application.*

4. If the owner, at the time of sale, was a minor, his guardian might redeem within two years.

The following acts were done :—

After the suppression of the rebellion, in April, 1865, Alexander Hunter, who attained his majority in June, 1864, appeared in person before the Board, took the oath of allegiance, "*tendered to them the amount of the tax, penalty, interest, expenses of sale and subsequent proceedings*, for the purpose of redeeming the property, but refused to take the oath that he had not taken part with the insurgents," &c.

It is conceded that the lands have not been redeemed in conformity with the conditions imposed by Congress *by anybody;* and

the only question, therefore, is, had Congress the power to impose these conditions?

We claimed below, as we claim here, that redemption is a *favor* offered to the owner, not resting upon any contract or obligation, which he must accept upon the terms offered, or not at all—an offer which may be withdrawn or made subject to new conditions at any time before it is accepted; that it was entirely competent for Congress to have made the sale conclusive, without any privilege of redemption; that the owner permits his land to be sold, knowing that he has nothing left but this privilege, which is liable at any time to be withdrawn altogether; that, in the language of the majority opinion, "Congress might allow redemption on such terms as it might prescribe, or it might refuse to allow it at all;" or, better expressed by Judge Rives, redemption is "a legislative boon, and there is no valid or reasonable objection to the power of Congress, by a retroactive law, to impose new conditions on its bounty, or to withdraw it altogether!"

We also claim that Congress, having first limited the privilege of redemption for sixty days to all persons alike, whether minors or adults, loyal or rebel, had a clear right to select a deserving class, and permit that class to redeem upon prescribed conditions. Such was the opinion of Senator Doolittle, the author of the law.

Cong. Globe, 1862, p. 2016.

We entertain the conviction that the construction of those portions of the Constitution which relate to *ex post facto laws*, to laws affecting vested rights, or which are retrospective in their character, to laws impairing the obligation of contracts, must be looked upon as settled by the numerous decisions of this Court. From these decisions we deduce the following conclusions:—

That the term *ex post facto*, as there used, applies exclusively to statutes which concern crimes and their punishments.

That a statute which impairs vested rights is not within the prohibition unless it impairs the contract *per se*, as contradistinguished from a right of action to enforce its performance, or a remedy for its non-performance.

That a statute which merely extends a favor or privilege creates no contract, even when acted upon, unless founded upon a consideration. For example, an act which exempts real property from taxation may be repealed at any time.

Christ Church *vs.* Philadelphia, 24 Howard R., 300.

That statutes which create remedies or declare the conditions, whether of time, place or circumstance, upon which they may be used, are not within the prohibition.

Satterlee *vs.* Matthewson, 2 Peters' R., 413.
Wilkinson *vs.* Leland, *ibid*, 627.
Calder *vs.* Ball, 3 Dall. Rep., 386.
Olney *vs.* Arnold, 3 Dall. Rep., 308.
Mechanics' Bank Appeal, 31 Conn. R., 63.
Mellvaine v Moore 2. Watts Penn. R 436.

The amendment of March 3, 1865, is applicable to the case.

This was also conceded by the Court below. The act of 1865 is in terms an amendment of the act of 1862. It provides for the disposition of moneys arising out of that act—confers new privileges upon former owners as well as purchasers. Its words are, "all sales *heretofore* or *hereafter to be* made," and its words comport with its intent. The oath, that the party asking to redeem had not engaged in rebellion, became as effectually a condition precedent to redemption as the payment of the tax.

We are next to consider under what provision Alexander Hunter could redeem, if he had the right of redemption at all. Was he the "owner," who must redeem within sixty days?—the "loyal owner," entitled to a year, because hindered by the rebellion?—or the "guardian of a minor," who was entitled to two years? The devise under which he claims is *in presenti:* "I give to Bushrod Hunter, until his son Alexander attain the age of twenty-one years, my Abingdon farm * * * ; but if the said Alexander should not live to the age of twenty-one years, in that event I give said farm to my ~~son~~ brother Bushrod, in absolute right forever."

Bushrod Hunter was the owner at the time of the sale (January, 1864), and continued to be the owner for more than sixty days thereafter (until June, 1865). The claimant had no right, title or interest until he reached his majority, and then he became the "owner" in fee. There was never an instant of time when the owner of these lands was under any disability. The right to redeem terminated in sixty days from the sale; upon any construction, it could not extend beyond sixty days from the claimant's majority.

When the owner is a minor, it is the guardian only who can redeem by the express terms of the statute. No application was ever made by the guardian.

Suppose Alexander had died the day before he reached his majority, the right would then have terminated clearly in sixty days from the sale. Suppose, the day after the sale, Bushrod had

conveyed the lands to a minor—or, to make the case clearer, suppose a levy made after the sale by a creditor who was a minor, so that the title passed by operation of law—could the minority of the subsequent owner postpone the right of purchaser?

It is apparent that Bushrod Hunter was the owner of the property, holding the fee, subject to the survivorship of Alexander, to the age of twenty-one years. But Alexander had no interest in the estate until his majority, not even the *inchoate* interest of an heir, for he took the estate by devise and not by descent.

The statute of Iowa enacted that "if the real property of any minor shall be sold for taxes, the same may be redeemed at any time within one year after the disability is removed." Under this act it was decided that, "to entitle the minor to the extension, it is requisite that he should be the owner of the property at the time of the sale. A subsequently acquired ownership would not entitle the owner, the year after the removal of the disability. The rights of the purchaser cannot be thus postponed.

Burton *vs.* Hintrager, 18 Iowa Rep., 349.
McComack v Russell, 2 S. Penn. 1 Casey, 1821
Cooper v Priestley 8 Watts 162

Under the redemption clause, if the owner had been prevented from redeeming by the rebellion, he might make his application within one year, and upon proper proof be entitled to redeem. The questions, was the applicant the owner? was he hindered by the rebellion? then became questions to be litigated before the Commissioners, upon notice to the purchaser. The decision of the Board might be appealed from to the Circuit Court, which in certain cases had originated jurisdiction. Suppose the claimant had made the application would not the answer have been complete—you have at present no interest in the property?

It would seem that this clause should have a farther application, which is fatal to the claimant's case. Is it not a decisive answer to the assertion that the term "owner," as used in this act, includes all persons having an interest? Suppose the owner in fact had been subject to no disability, and actually present at the sale and before the Commissioners during the entire sixty days, and that Ware, the "tenant in occupation," but having no title to the lands, nor any lien upon them, had been hindered by the rebellion—could Ware in such a case come in within the year, when the real owner had been completely divested of the right of redemption?

The bearing of this section upon the form of the proceeding in which the claimant treats the judicial decision of the Commissioners as a nullity, and seeks to recover without setting the record aside,

or prosecuting his petition for a mandamus, has been elsewhere considered.

We conclude, then, that the decision of the Court below, that the lands had not been redeemed, was correct.

The claimant in April, 1865, fifteen months after the sale, made application to redeem. He made a tender of the tax costs, expenses of the sale, &c. He took the oath of allegiance. The effect of the tender upon the alleged irregularities in the sale remains to be considered.

It seems to be settled by reason as well as authority that a tender is an admission that the sum tendered is due, and that the plea of tender concludes the pleader from denying that he owes the money. It is equally well settled, where the claim arises by operation of law, that the tender admits the application of the law and compliance with its conditions. Tender and *non assumpsit* or *nil debet* cannot be pleaded at the same time, for they are inconsistent. This is one of the first principles of the law of tender.

It has therefore been properly decided that the tender of a tax by the owner after a sale of lands, not only admits the amount due, but is a waiver of any irregularity in the assessment or sale.

Burton *vs.* Hintrager, 18 Iowa Rep. 349, affirming, Barton *vs.* Milligan, 16 Iowa Rep., 44.

The tender was made by a person of full age, with full notice of the facts which had transpired, with no reservation whatever, with no claim that the Board had exceeded its powers, or wrongfully refused the application of Ware. It covered the expenses of the sale, and was accompanied with a specific application to redeem. The party took the oath of allegiance, and thus qualified himself so far as he could to make the application. He thereby admitted the validity and regularity of the previous proceedings, including the sale. He must stand or fall by his tender.

It is claimed that our construction of these statutes gives them the effect of confiscation acts, and subjects them to the criticism and construction which belongs to statutes of that class. This claim is not well founded.

So far as the assessment of the tax, the creation of the lien, and its discharge by payment at any time before forfeiture are concerned, the statute and its amendments make no distinctions between rebels and loyal citizens. The same restrictions, penalties and costs are imposed upon all owners of property subject to the tax. The highest officer in the rebel service was as free to make

the payment by himself or his agent, as a loyal soldier of the Federal army. By the amendment of 1863, the right to appear in person and pay was extended to the sale itself to all owners alike. Failure to pay was attended by the same consequences; payment produced the same results in the case of a disloyal as in that of the loyal owner.

It is only when the neglect has occurred, the forfeiture takes effect, the Government has entered into possession of the forfeited estate, advertised it, and cut off the rights of all owners alike by a public sale, that any distinction is made. Then, and not until then, when Congress offers *the favor*, *the privilege* of redemption, it prescribes the conditions upon which this favor is bestowed. Then, when the Government is dealing with its own property, it declares in substance that the privilege shall not be exercised by those who have aided the rebellion. If the fact of disloyalty is denied, the Federal Courts are open for its decision. The claimant may enter, unless, as in the present case, he admits his inability upon the record.

It seems to us a misnomer to apply the term "confiscation" to statutes of this character. "With entire deference to others, it seems to me (us) to be an abuse of language to characterize such treatment as punishment or confiscation in disguise"—(Opinion of Judge Rives.)

One position in the majority opinion below perhaps deserves a more specific answer. It is the claim upon which the whole opinion rests—that the owner's title is divested only by the sale, and that the lands are sold as the property of the former owner.

This claim rests upon a misconstruction of the law of forfeiture.

Except in cases of sales upon judicial process, where property is sold to satisfy a money demand in which forfeiture is not involved, the right cannot exist in the Government to sell the property of a citizen. There is no case *of forfeiture* in which the property can be sold until the former owner is divested of his title. The right to sell exists *because* he has lost his property by some act or neglect, and the Government *by seizure* has given effect to the law. Therefore, where property is forfeited under the revenue or navigation laws, and condemnation precedes the sale, it is the *seizure*, and not the sentence or sale, which divests the title; and when the seizure is made, it gives effect to the forfeiture from the date of the act or neglect which caused it.

See Curtis' C. C. R.

The law is the same in respect to real property.

Clark *vs.* Strickland, 2 Curtis' C. C. R., 327.

5 Hodgden *vs.* Wright, 36 Maine R., 439.

If this view of the Court were correct, the Government would perform the impossible act of passing the title to property, by a sale without the owner's consent, to which it had acquired no claim. The owner could evade the law and escape the forfeiture by a simple transfer of the title at any time before the sale. The title would never vest in the Government, but would pass directly from the former owner to the purchaser.

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1869.

HENRY S. MARTIN,

Pl'ff in Error,

vs.

ROBERT BEVERLY and EDGAR SNOWDEN.

POINTS FOR PLAINTIFF IN ERROR.

The facts in this case are identical with the preceding case, with a single exception. The argument will therefore be confined to the questions raised by this exception.

The property involved was conveyed, in 1856, by one Fowle to the claimants, Beverly and Snowden, by deed, containing full power of sale, entire or in separate parcels, in trust for the use of the wife of the grantor, and was held by them under this deed from its date to the sale, in January, 1864.

During the time covered by the proceedings, Beverly resided in Fauquier County, Virginia; Snowden in the State of Maryland. Neither of them made any effort to pay the tax or redeem the lands, which were sold and assessed as a single parcel, and consisted of a house and lot in Alexandria. "The nature of the property was such as to admit of partition." Fowle and his wife left the

property at the breaking out of the rebellion, went within the Confederate lines, and there remained until it was suppressed; after which Mrs. Fowle returned, appeared in person before the Board of Commissioners, tendered the tax, expenses of sale, &c., took the oath to support the Constitution, but declined to take the oath that she had not aided in the rebellion.

Before the sale, but after the property was advertised, one Boothe, "a friend of Mrs. Fowle, went to the office of the Tax Commissioners, prepared to pay, &c., but made no tender of the money, being informed by the Commissioners that they could not receive the money except from the owner in person."

In this case the owners of the property abandoned it to its fate. There is no proof that they were under any disability, or even that they were disloyal. They have made no application to pay or redeem it, and, so far as the facts are disclosed by the record, they may have considered this the most judicious disposition of the property that could have been made under their deed.

It presents the question whether the tax in law was paid by the appearance before the Board of a volunteer, a stranger to the title, who did not claim to act for the owners, and who was "prepared to pay," but did not either pay or make a tender of payment!

The judgment cannot be sustained except upon grounds assumed in the Court below, that the act itself is in conflict with the provisions of the Constitution, and conferred no power upon the Commissioners to sell the entire estate *in any case;* for in neither of the cases does the record show that the sale of a portion of the premises would not have been more injurious to the owner than a sale of the whole.

Another suggestion is applicable to both cases. It is the right of the purchaser to claim that the former owner shall assert his rights, if at all, in the manner prescribed by the law, which is by a redemption of the lands before the Commissioners, and in case of their wrongful refusal by a *mandamus* to compel the performance of their duty. In that case the rights of the purchaser are protected. If the lands are redeemed, the law provides for a repayment of the purchase money without further proceedings. The objection to the form of the action is not a technical one. It goes to the merits of the case, and is essential to the protection of the purchaser.

We also claim that these actions should have been removed to the Circuit Court, under the provisions of the act of March 3, 1863. They are founded, if they have any foundation, upon "acts done or omitted to be done by virtue or under color of authority derived

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

HENRY M. BENNETT, *Plaintiff in Error*,
vs.
ALEXANDER HUNTER.
} No. 74.

In error to the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1869.

HENRY M. BENNETT, *Plaintiff in Error*,
vs.
ALEXANDER HUNTER. } No. 74.

In error to the Supreme Court of Appeals of the Commonwealth of Virginia.

BRIEF FOR THE UNITED STATES.

The Attorney General, in behalf of the United States, by permission of the court, respectfully submits the following brief:

STATEMENT.

In October, 1866, an action was brought by the defendant in error against the plaintiff in error, in the circuit court of Alexandria county, Va., for the unlawful detainer of certain real estate, situated in said county, which the latter occupied under a lease from one Chittenden, who had purchased the premises at a tax sale made in January, 1864, by the board of United States tax commissioners, appointed in pursuance of the act of June 7, 1862, providing for the collection of the direct taxes in insurrectionary districts.

By the 8th section of the act of August 5, 1861, (12 Stat., 294,) Congress imposed a direct tax of $20,000,000 per annum upon the whole of the United States, of which the sum of $937,550 66 was apportioned to the State of Virginia. The 13th section provided that the tax should be assessed and laid on all lands and lots of ground, with their improvements and dwelling-houses, according to their money value on the 1st of April, 1862. Other sections of the act, whose provisions it is not important to mention in detail here, provided for the assessment and collection of the tax, and, for the latter purpose, authorized the distraint and sale of the personal estate of delinquents, and, if that proved insufficient, the sale of so much of their lands as might be necessary to satisfy the taxes due thereon, &c., or, where the lands were not divisible, then the whole thereof; and furthermore provided that, in the event of a sale of property for non-payment of the tax assessed thereon, the owners, their heirs, executors, administrators, or any person in their behalf, might redeem the same within a certain period thereafter. The act also provided that if, at the time it went into operation, any of the people of any State or Territory should be in actual rebellion against the authority of the United States, so that the laws of the United States could not be executed therein, it should be the duty of the President to execute the provisions of the act in such State or Territory as soon as the authority of the Government should be re-established.

But, afterwards, by the 1st section of the act of June 7, 1862, (12 Stat., 422,) it was declared, that when in any State or Territory, or in any portion thereof, the civil authority of the Government of the United States should be obstructed by insurrection or rebellion, so that the provisions of the former statute could not be peaceably executed, the direct taxes apportioned by that statute among the several States and Territories should be apportioned and charged in each State and Territory, or part thereof, wherein the civil authority was thus obstructed, upon all the lands and lots of ground situate therein, respectively, &c., as the same were enumerated and valued under the last assessment and valuation thereof made under the authority of said State or Territory previous to January 1, 1861; and each and every parcel of the said lands, according to said valuation, was declared to be charged, by virtue of the act itself, "with the payment of so much of the whole tax laid and apportioned by said act upon the State or Territory wherein the same is, respectively, situate, as shall bear the same direct proportion to the whole amount of the direct tax apportioned to said State or Territory as the value of said parcels of land shall, respectively, bear to the whole valuation of the real estate in said State or Territory, according to the said assessment and valuation made under the authority of the same," and in addition thereto with a penalty of fifty per centum of said tax.

The 2d section provided that, on or before July 1,

1862, the President should, by proclamation, declare in what States and parts of States insurrection existed, and that thereupon the said several lots or parcels of land should become charged with their respective portions of the tax, and the same together with the penalty should be a lien thereon, without any other or further proceeding whatever. In pursuance of this provision, the President issued a proclamation, on the 1st of July, 1862, declaring that part of the State of Virginia in which the land in controversy is situated to be in insurrection and rebellion, by reason whereof the provisions of the act of August 5, 1861, could not be peaceably executed therein, (12 Statutes, 1266.)

The 3d section allowed the owner or owners of the lands, within sixty days after the amount of the tax charged thereon, respectively, should have been fixed by the tax commissioners, to pay the same into the Treasury of the United States or to the commissioners, and take a certificate thereof, by virtue of which the lands should be discharged from the tax.

The 4th section enacted as follows:

"That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and, upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever."

The 5th and 6th sections provided for the appointment of a board of three tax commissioners for each of

the States in which the insurrection existed, and fixed the time when they should enter upon their duties, &c.

The 7th section, as amended by the act of February 6, 1863, (12 Stat., 640,) required the said board, in case the taxes charged on the lands should not be paid agreeably to the provisions of the 3d section, to advertise the property for sale, in the mode and for the period prescribed, and at the time and place of sale to cause the same to be sold to the highest bidder, for a sum not less than the taxes, penalty, and costs, and ten per cent. per annum interest on the tax. And it also authorized the commissioners, in all cases where the owner of the property should not, on or before the day of sale, appear in person before them and pay the amount of the tax, with ten per cent. interest thereon and cost of advertising, or request the property to be struck off to a purchaser for a less sum than two-thirds of the assessed value thereof, to bid off the same for the United States, at a sum not exceeding two-thirds of its assessed value, unless some person should bid a larger sum, and in that case it declared that the property should be struck off to the highest bidder, who, upon payment of the purchase-money, should be entitled to receive from the commissioners their certificate of sale, which was thereby required to be received as *prima facie* evidence of the regularity and validity of the sale, and of the title of the purchaser under the same, in all courts and places; with a proviso that the certificate should only be affected as evidence of the regularity and validity

of the sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of the act. Also, by a proviso to this section, the owner of the property, or any loyal person having any valid lien upon or interest in the same, might, within sixty days after the sale, appear in person before the board of tax commissioners, and, if a citizen, upon taking an oath to support the Constitution, and paying the amount of the tax and penalty, with interest thereon, from the date of the proclamation mentioned in the 2d section, at the rate of fifteen per centum per annum, together with the expenses of the sale and subsequent proceedings, &c., redeem the same; and, if the owner were a minor, a non-resident alien, a loyal citizen beyond seas, a person of unsound mind, or under legal disability, the period of two years after the sale was allowed for redemption.

The remaining provisions of the act of June 7, 1862, it is deemed unnecessary to notice here.

Subsequently, by a proviso to the 7th section of the act of March 3, 1865, (13 Stat., 502,) it was declared that no owner should be entitled to redeem, unless, in addition to the oath prescribed by the laws then existing, he should swear that he had not taken part with the insurgents in the then present rebellion, or in any way given them aid or comfort, and should satisfy the board of commissioners that the said oath was true; and

by a further proviso thereto, tenants at sufferance or at will were not allowed to redeem, nor was a tenant for years allowed to redeem, unless he should satisfy the board of commissioners, in addition to the other requirements of the law, that the owner of the reversionary estate had been loyal and not in any manner engaged in the rebellion, nor in giving aid or comfort to rebels.

The defendant in the action below appeared and moved the court to remove the cause for trial to the circuit court of the United States for the State of Virginia, under the provisions of the act of March 3, 1863, (12 Stat., 755;) but the motion was denied, whereupon the defendant excepted to the ruling of the court. Afterwards, upon trial, the jury found a special verdict, from which it appeared—

That, several years prior to the late rebellion, an uncle of the plaintiff died seized of the land in controversy, by whom it was devised to the father of the plaintiff until the latter should attain the age of 21 years, and then to the plaintiff, who arrived at that age on the 4th of June, 1864; that about the breaking out of the rebellion the plaintiff, then a minor, and his father went into the rebel lines and service, and so continued until the surrender of Lee; that the premises were subject to the direct tax imposed by the act of August 5, 1861, and, at a sale of lands for unpaid taxes on the 11th of June, 1864, were struck off by the tax commissioners to L. E. Chittenden, he being the highest bidder; that, after the advertisement of the premises, and before sale

actually made, a tenant in occupation of a portion thereof applied to the tax commissioners to pay the tax and expense, penalty, costs, interest, &c., upon the property, but that the commissioners refused to receive the same, except from the owner in person; that, in the spring of 1865, and subsequent to the 3d of March, 1865, the plaintiff appeared in person before the tax commissioners, took the oath to support the Constitution of the United States, tendered to them the amount of the tax penalty, interest, expenses of sale and subsequent proceedings, for the purpose of redeeming the property, but refused to take the oath prescribed by the 7th section of the act of March 3, 1865, (13 Stat., 502;) that the premises were susceptible of partition, and that a part thereof might have been sold to pay the tax, &c., imposed thereon; that the defendant was in possession under a lease from the said Chittenden, having entered upon the premises on or about the 1st of April, 1866, prior to which time, and subsequent to the 11th of January, 1864, his lessor was in possession, claiming under a certificate of sale issued by the tax commissioners on the last mentioned date; and that on the 4th of September, 1865, the plaintiff received a conditional pardon from the President for all offences arising from participation in the rebellion, which was duly accepted.

Judgment being thereupon rendered for the plaintiff in the circuit court of Alexandria county, the defendant carried the case therefrom to the

district court of appeals for the 4th district of Virginia, and thence to the supreme court of appeals of that State, in each of which the judgment of the said circuit court was sustained.

The case is now before this court on a writ of error to the supreme court of appeals of the State of Virginia.

ARGUMENT.

I. Congress, having power to "lay and collect" taxes, and "to make all laws which shall be necessary and proper for carrying into execution" that power, may, for the purpose of enforcing their collection, declare a forfeiture of land for the non-payment of taxes laid thereon, or authorize a sale, by summary proceedings on the part of the executive branch of the government, of the whole of such land.

It will not be questioned that the same means which may be employed by the State Governments to compel the payment of direct taxes are equally available to the Federal Government for the like purpose. Several of the States have, as coercive measures directed to that end, enacted laws providing for the forfeiture of landed property upon default in the payment of taxes assessed thereon; and though there has been some diversity of opinion as to the mode of enforcing these forfeitures, the power of the local legislatures to pass such laws has in general been sustained. As in the case of sales for unpaid taxes, these enactments for the

forfeiture of delinquent lands are usually accompanied with provisions granting to the former owners the privilege of redeeming their property within a stated period, upon complying with certain conditions.

Thus, a law of the State of Maine (see Rev. Statutes, 1857, ch. 6, s. 33, page 108) provides that lands in places not incorporated, upon which taxes are not paid, with interest, within two years from the date of the assessment, "shall be wholly forfeited to the State, and vest therein, free of any claims by any former owner or person." Earlier statutes of that State also contain similar provisions. The validity of these laws is assumed in the following cases arising thereunder:

Clarke *vs.* Strickland, 2 Curtis, 439.
Hodgdon *vs.* Wright, 36 Maine, 326.
Hill *vs.* Mason, 38 *ibid.*, 461.
Loomis *vs.* Pingree, 43 *ibid.*, 299.
Williamsburg *vs.* Lord, 51 *ibid.*, 599.

So in Virginia, by an act passed in 1790, all laws directing lands to be *sold* for the payment of taxes were repealed, and it was provided "that in case the tax upon any tract of land shall not be paid for the space of three years, the right to such land shall be lost, forfeited, and vested in the Commonwealth." (See 2 Henning & Mumford, 318, note.) As to the construction given by the courts of that State to this and other subsequent statutes of like import, see the following cases, in none of which is their validity doubted:

Kinney *vs.* Beverly, 2 Hen. & Mumf., 318.

Chapman *vs.* Bennett, 2 Leigh, 329.
Wilson *vs.* Bell, 7 *ibid.*, 22.
Flanagan *vs.* Gummet, 10 Grattan, 421.
Lohrs *vs.* Miller's lessee, 12 *ibid.*, 452.
Usher's heirs *vs.* Pride, 15 *ibid.*, 190.

Similar laws have also been enacted by the State of Ohio, the validity of which have never been questioned.

McMillan *vs.* Robbins, 5 Ohio, 28.
Reynolds *vs.* Leiper's heirs, 7 *ibid.*, pt. 1, p. 17.
Winder's lessee *vs.* Sterling, 7 *ibid.*, pt. 2, p. 190.
Buckley's lessee *vs.* Osborn, 8 *ibid.*, 180.
Hannel's lessee *vs.* Smith, 15 *ibid.*, 134.
Thevennin *vs.* Slocum's lessee, 16 *ibid.*, 519.

And by the State of Kentucky, as to which see

Barbour *vs.* Nelson, 1 Littell, 60.
Robinson *vs.* Huff, 3 *ibid.*, 38.

And by the State of Mississippi. (See act of March 9, 1850, session laws, ch. 2, p. 50.)

The act last referred to came under the consideration of the court of appeals of Mississippi, in the case of Griffin *vs.* Mixon, 38 Miss., 424, when, by a divided bench, so much thereof as provided for a forfeiture of land to the State, on failure of the owner to pay the taxes due thereon, was pronounced to be void, as being in violation of the State constitutional provision declaring that a citizen shall not be deprived of his property but by due course of law. But this objection was ably answered in the dissenting opinion of Handy, J., (38 Miss., 455 to 469,) and, as will be shown in another

place, the case just cited is in direct conflict with the general current of authority.

With regard to the authority of the legislature to provide for the sale of the whole of the land, in the event of non-payment of the taxes assessed thereon, irrespective of circumstances wherein a less quantity would be sufficient to discharge the lien, and where the land might be conveniently divided, there is no room for doubt. If the legislature can declare a forfeiture of delinquent lands to the government as a mode of coercing payment of taxes, it can certainly direct a sale of them.

The authorities cited on the other side, not only fail to show that there is any limitation upon the power of the legislature in this respect, but, on the contrary, they clearly establish that the quantity of land which may be sold depends entirely upon the legislative will.

On this subject, see Blackwell on Tax Titles, pp. 286 to 295, and the cases there referred to.

It is, then, equally within the power of the legislature to provide that the whole or only a portion of the premises charged with taxes shall be sold; and whether the one mode or the other should be resorted to is simply a question of legislative discretion.

31 N. Y. Rep., (4 Tiffany,) p. 580.

II. These summary measures for enforcing the payment of taxes are not in conflict with the constitutional provision which declares that no person shall be deprived of property without "due process of law."

It is well settled that neither the provision that private property shall not be taken for public use without just compensation, nor the other clause declaring that no person shall be deprived of his property without due process of law, imposes any restraint upon the legislative power in regard to taxation.

Sedgwick on Stat. and Const. Law, 501.

Thus, the supreme court of California has held that the latter provision is not applicable to proceedings by the State to obtain from citizens their proper contributions to the expense of administering the government.

High *vs.* Shoemaker, 22 Cal., 363.

And see 10 La. Annual, 764.

So held by the supreme court of Connecticut, that the provision that private property shall not be taken for public use without just compensation, has no reference to the collection of taxes.

Nichols *vs.* Bridgeport, 23 Conn., 205.

That clause refers solely to the exercise by the State of the right of eminent domain.

Gilman *vs.* Sheboygan, 2 Black, 513.

So, in Iowa, it has been held that where property is taken in the due and valid exercise of the power to tax, the owner is not deprived of it "without due process of law," within the constitutional meaning of these words.

Allen *vs* Armstrong, 16 Iowa, 512.

And the same doctrine is impliedly assumed or admitted in the various cases cited in connection with the first point presented in this brief.

The mode of levying, as well as the right of imposing taxes, is completely and exclusively within the legislative power; and the existence of government, depending on the prompt and regular collection of the revenue, must, as an object of primary importance, be insured in such a way as the wisdom of the legislature may prescribe.

Cowles *vs.* Brittain, 2 Hawks., 207.

When the State seizes and sells land for the non-payment of taxes, the proceeding is administrative, and not judicial. The legislature may or may not make use of judicial forms or judicial tribunals, as shall seem most convenient or most conduoive to the object in view, and most advantageous to the State and to the tax payers.

31 N. Y. Rep., (4 Tiffany,) 579, 580.

And see 6 Monroe, 643.

III. The 4th section of the act of June 7, 1862, created a forfeiture to the United States of land in the insurrectionary States upon which the direct tax had not been paid as provided in the 3d section of that act, which took effect at the time of default and prior to the sale or disposition of the property as provided for in the 7th and other following sections of the act.

This appears from the plain import of the language employed in declaring the forfeiture. It is, "that the title of, in, and to each and every piece and parcel of land upon which said tax has not been paid as above

provided, shall *thereupon* become forfeited to the United States," &c. The latter clause of the section, which reads, "and, upon the sale hereinafter provided for, shall vest in the United States, or in the purchasers at such sale in fee simple," &c., has been supposed to qualify the preceding clause respecting the time when the forfeiture becomes absolute; but the error of this view is pointed out in the able opinion of Rives, J., in the court below. (See 18 Grattan, 111.) Referring to the 4th section of the act of 1862, he observes:

"There are two branches of it—first, the forfeiture of title, and, secondly, the ultimate vesting of that title. To declare *the title*, in the particular event, to be forfeited to the United States, clearly means that *the title* is divested out of the defaulting owner, and devolved upon the United States. It does not say that the delinquent lands shall be forfeited; but *the title* of the owner of them shall be lost to him, and forfeited to the United States. But how, and for what purpose forfeited? The law itself gives the reply: not to be held by the United States for its own use, but to be sold for payment of taxes, penalty, and costs; and that sale, under the scheme of the law, becomes the appointed mode in which *the title* ultimately *vests*. Now, the condition of this sale is to the highest bidder, but in case no one bids to the amount of the penalty and costs, then it may be struck off to the United States at that sum. By the subsequent amendatory act of February 6, 1863, the privilege of bidding by the commissioners, for and

on behalf of the United States, was enlarged to the extent of two-thirds of the assessed value; and in cases of lands selected under the direction of the President for government use, for war, military, naval, revenue, charitable, educational, or police purposes, the commissioners, under the President, were at liberty to bid for them and have them struck off to the United States. In this way, the law appointed and designated two classes of purchasers at the sale—first, the highest bidders, and, secondly, the United States, acting through the commissioners, and subject to the restrictions of these acts. The United States, as well as the highest bidders, might be purchasers at these tax sales. * * When, therefore, the latter clause of this 4th section declares, that "the title, upon the sale hereinafter provided for, shall vest in the United States or the purchasers at such sale," it has exclusive reference to the United States as *a purchaser*, and not as *the sovereign*, to whom the forfeiture had been declared in the preceding clause. To my mind, it does not admit of a doubt that the forfeiture is absolute and unqualified, and is not in any wise modified or restricted by this latter provision for the *vesting* of the forfeited title."

After default, therefore, there was nothing left in the owner but *a mere privilege of redemption*, capable of being exercised only in such mode and upon such terms as the law prescribed.

A point is made, on the other side, that *if* the forfeiture here denounced is to be regarded as a penalty upon

persons engaged in the rebellion against the United States, then it is a legislative conviction and punishment without trial of all who fail to pay the tax, and is in violation of the constitutional provision which forbids Congress to pass a bill of attainder. But the forfeiture is not to be thus regarded. So plain does this appear, from the language of the law itself, that argument cannot make it plainer. And, moreover, the oath required by the act of March 3, 1865, to be taken by the owner before he is allowed to redeem his property from the forfeiture, viz: that he took no part in the rebellion, nor afforded aid or comfort to those engaged therein, does not operate to deprive the owner who *has* taken part in the insurrection of any *right*, but merely to withhold from him the enjoyment of a *favor* or act of grace on the part of the government. It in no sense inflicts a punishment upon such owner for past conduct, within the principle laid down by this court in Cummings *vs.* Missouri, 4 Wall., 277.

IV. But, even if the forfeiture did not work a divestiture of the owner's title until after a sale of the land, still the result in this case would practically be the same, since, upon the facts found, nothing appears which affects the validity of the sale that actually took place.

Both the 7th section of the act of 1862, as it originally stood, (12 Stat., 423,) and the act of February 6, 1863, amendatory thereof, (*ibid.*, 640,) provide that the certificate of the tax commissioners shall be received in

all courts and places as *prima facie* evidence of the "regularity and validity" of the sale, and that it shall only be affected as such evidence by establishing the fact that the property was not subject to the tax, or that the tax had been paid previous to the sale, or that the property had been redeemed according to the provisions of those acts.

The obvious design of these provisions was to mitigate the strictness of the rules of law applicable to tax sales. Upon the principle that a special statutory authority must be strictly pursued, it was generally held by the courts to be essential to the validity of such sales, and to the passing of titles thereby, that all the proceedings of the officers who had anything to do with the listing and valuation of the land, the levy and collection of the tax, the advertisement and sale of the property, the return, filing, or record of the proceedings, whether the acts were to be performed before or after the sale, must be in strict compliance with the statute. (See 4 Cranch, 403; 9 *ibid.*, 64; 4 Wheat., 77; 5 *ibid.*, 116; 6 *ibid.*, 119; 8 *ibid.*, 681; 16 How., 610; 4 McLean, 138, 211, 490; 6 *ibid.*, 365, 418.) By making the certificate of sale evidence of the *regularity* and *validity* of the sale itself, to support the title of the purchaser the proof of compliance with statutory requirements of the character just mentioned by the agents of the government engaged in executing the direct tax law in the insurrectionary States, was rendered unnecessary.

In reference to a similar provision in the statutes of Arkansas, whereby the deed of a tax collector, on a sale of delinquent lands, was made evidence of the regularity and legality of the sale of such lands, this court, in Pillow *vs.* Roberts, 13 How. 476, say: "The evil plainly intended to be remedied was, the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were fully complied with antecedent to the sale and conveyance by the collector. Experience had shown that where such conditions were enforced, a purchaser at tax sales, who had paid his money to the Government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. *The power of the legislature to make the deed of a public officer prima facie evidence of the regularity of the previous proceedings cannot be doubted.* And the owner who neglects or refuses to pay his taxes or redeem his land, has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not, he has no right to complain if he suffers the legal consequences of his own neglect."

See further, Thomas *vs.* Lawson, 21 How. 340.

That the legislature has power to prescribe the evidence to be received, and the effect of that evidence, in judicial proceedings, see, also, Freeman *vs.* Thayer, 33 Maine, 76.

And in a late case, the supreme court of Wisconsin held that it is competent for the legislature to declare what part of the proceedings required by law in the collection of taxes upon land shall or shall not be essential to the validity of the tax sale or tax deed; and, therefore, competent for it to declare that after the execution of the deed it shall not be invalidated by any defects or irregularities in such proceedings in case the land was subject to the taxes levied upon it and they were not paid.

Smith *vs.* Cleveland, 17 Wis., 556.

In connection with the same subject, reference is also made to the able opinion of Mr. Justice Miller, in the case of Lord *vs.* Milwaukee and Miss. R. R. Co., which appears in a note at the end of the case of Smith *vs.* Cleveland, 17 Wis., 569.

See, also, Hand *vs.* Ballou, 2 Kern., 541.

Allen *vs.* Armstrong, 16 Iowa, 508.

Accordingly, the certificate of the board of tax commissioners, issued to the purchaser of the premises in controversy, must be regarded as conclusive of the validity of the sale, and an undoubted muniment of title, unless from the facts found in the special verdict it either appears—1st, that the land was not subject to the tax; or, 2d, that the tax had been paid previous to the sale; or, 3d, that the property has been redeemed in accordance with the provisions of the statute.

1. As to the first of these particulars, the fact of the liability of the premises to the direct tax imposed by

the act of August 5, 1861, clearly appears in the record. (See printed Transcript, p. 15.)

2. It does *not* appear that the tax was paid before the sale. The verdict finds, "that after the advertisement of the sale of said premises referred to in said certificate, and before sale actually made, Charles A. Ware, then *a tenant in occupation of about one-half of said premises*, applied to the said tax commissioners to pay the tax and expense, penalty, costs, interest, &c., upon the property; but the commissioners refused to accept the same, except from the owner in person," &c. (Printed Transcript, p. 15.) We concede that a *lawful* tender of the tax to the officer authorized to receive it would have been tantamount to payment, but deny that the tender in this case, if there was a tender, was lawful, it not having been made by the *owner* in person, as the law required. (See act of February 6, 1863, 12 Stat., 640.) In this statute, as well as in the act of which it is amendatory, there can be no doubt that the term owner was designed by Congress to include a proprietor only, and not his tenant or other person left in charge of his estate. (See on this point the remarks of Rives, J., in 18 Grattan, 115 to 117.) Indeed, there does not appear to have been any conflict of opinion in the court below touching the sense in which the word owner is used in the statute. (See 18 Grattan, 148.)

3. Nor does it appear that the property was ever redeemed. The defendant in error could not avail himself of the privilege of redemption after sale, without

complying with such conditions as were imposed by *the law existing at the time of his application to redeem.* Statutory privileges of this kind are not vested rights, but mere acts of grace and favor on the part of the government, and are in their nature subject to modification or recall, at the discretion of the legislature. (See Cooley's Const. Limitations, 383.) Grant it, then, that the defendant in error, being a minor when the sale of the premises took place, came within the second proviso of the act of February 6, 1863, and that the period for redemption there provided had not expired at the time of the passage of the act of March 3, 1865, yet, as his application to redeem was made subsequent to the date of the latter act, it could only be allowed upon the new conditions imposed thereby. These he refused to comply with. (See printed transcript, p. 16.)

V. The pardon granted by the President did not relieve the defendant in error from compliance with those conditions.

It is conceded that the pardon freed him from all penalties and disabilities attached to the offence of treason committed by his participation in the rebellion; and that he could not thereafter be excluded, by the exaction of an expurgatory oath covering that offence, from continuing in the enjoyment of any previously acquired right. (4 Wall., 381.) But the oath required by the act of March 3, 1865, as a condition to redeem property forfeited for non-payment of taxes, did not have

the effect of precluding him from the enjoyment of any pre-existing *right*. At most, it only presented an obstacle in the way of his deriving any benefit from a mere act of grace or favor on the part of the government, the granting or withholding of which rested entirely in the discretion of Congress, and which it was competent for that body to extend to whomsoever it pleased, and upon whatever terms it saw proper to impose. If the defendant in error was excluded from exercising the privilege of redemption by reason of his inability to comply with the terms of the statute on account of past conduct, such exclusion cannot properly be deemed a *punishment* for that conduct. In the absence of any penal consequences attending the exaction of the oath referred to, it is not perceived that it conflicted with the legal effect and operation of the pardon. The pardoning power is not a dispensing power.

E. R. HOAR,
Attorney General.

W. A. FIELD,
Assistant Attorney General.

In the Supreme Court of the U. States.

HENRY M. BENNETT,
Plaintiff in Error,

vs.

ALEXANDER HUNTER.

Brief of Argument for Defendant in Error.

ROBERT PORTNER & FREDERICK RECKER,
Plaintiffs in Error.

vs.

WM. G. CAZENOVE.

HENRY S. MARTIN,
Plaintiff in Error.

vs.

BEVERLY & SNOWDEN.

The questions arising in these Cases are indentical with those arising in the case of Bennet vs. Hunter, with the exception that the question of redemption is not involved in Portner & Recker vs. Cazenove.

S. F. B.

IN THE SUPREME COURT OF THE UNITED STATES.

HENRY M. BENNETT,
Plaintiff in Error,
vs.
ALEXANDER HUNTER.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

The general question presented by this cause is the validity of a title to land acquired by purchase at a tax sale.

The subject matter of controversy is a large and valuable real estate in the county of Alexandria, Va., sold in 1864 for default, or for alleged default in the payment of the direct tax imposed upon it by the act of Congress approved August 5, 1861. XII. Statutes at Large, 292.

By this act of August 5, 1861, a direct tax of $20,000,000 was laid upon the United States, of which tax, $937,550 66 was apportioned to the State of Virginia.

The act provided the usual machinery for the assessment and collection of the tax, including the usual remedies for coercing payment in cases of delinquency.

Afterwards, on the 7th day of June, 1862, Congress passed another act, entitled "An act for the collection of the direct tax in insurrectionary districts within the United States, and for other purposes." XII. Stat. at Large, 422.

This latter act provides a mode for assessing, levying and collecting this tax in places where the provisions of the former act could not be peaceably executed, by reason of insurrection and rebellion.

The provisions of the act of June 7, 1862, are substantially as follows:

Every piece or parcel of land within any insurrectionary State is charged with such proportion of the entire tax laid upon the whole State, as the valuation of the said piece or parcel bears to the valuation of all the land in the State; and,

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in addition thereto, it is also charged with a penalty of fifty per centum of said tax. [Section 1.]

The President is to declare, by proclamation, on or before July 1, 1862, what States are in insurrection, and thenceforth every parcel of land is to be charged with its tax and penalty, and the same are to be a lien upon the land. [Section 2.]

Commissioners, three for each State, are to be appointed by the President to fix the amount of the tax charged upon each lot or parcel of land, and they are to enter upon the discharge of their duties whenever the Commanding General of the United States forces, entering into any such insurrectionary State, shall have established the military authority of the United States throughout any parish, district or county of the same. [Sections 5 and 6.]

Within sixty days after the Commissioners have fixed the amount of the tax, the owner of any lot is required to pay the tax to the Commissioners or into the treasury of the United States; whereupon, the land is to be discharged from the tax. [Section 3.]

Section 4 enacts:

"That the title of, in and to each and every parcel of land "upon which said tax has not been paid as above provided, "shall thereupon become forfeited to the United States; and, "upon the sale hereinafter provided for, shall vest in the "United States, or in the purchaser at such sale, in fee sim- "ple, free and discharged from all prior liens, incumbrances, "right, title and claim whatsoever."

On default in the payment of the tax within sixty days, the Commissioners are required to sell the lands of delinquents at public auction—the sale to be for a sum not less than the tax, penalty, interest and costs, at which sum the land is to be struck off to the United States in the absence of a higher bid;—provision is also made for the redemption of the land after sale. [Sections 7 and 8.]

The further provisions of the act relate to the disposition of the lands struck off by the Commissioners to the United

States—authorizing the leasing and selling of these lands and the payment of the proceeds of the leases and sales into the treasury of the United States.

Such are the leading provisions of the original act of June 7, 1862—its subsequent amendments will be fully noticed hereafter.

Under the provisions of this act, the land in controversy was sold, and was purchased by the plaintiff in error, or by the party under whom he claims, and upon the validity of the title thus acquired depends the decision of this cause.

The defendant in error, who was theretofore the owner of the land, denies the validity of this title upon two general grounds:

I. The sale itself, under the circumstances of the case, was wholly unauthorized, and was consequently void.

II. Conceding that the sale was authorized and valid, the land was redeemed after the sale, and the defendant in error was thereby re-invested with his former title.

AS TO THE VALIDITY OF THE SALE.

The sale was without authority and void for two reasons:

1. Because the full amount of tax, interest, penalty and costs was tendered to the Commissioners before sale.

2. Because the Commissioners sold the whole land when a small portion of it might have been sold for enough to pay all dues and costs.

1. The direct tax for which the land in controversy was liable, was not paid within sixty days from the time when the amount of the tax was fixed by the Commissioners.

It was thereupon advertised for sale; after the advertisement of sale, and before sale was actually made, a tenant of the property tendered to the Commissioners the tax, penalty, interest and cost, for the purpose of preventing a sale. The Commissioners declined to accept the money—proceeded to

make the sale—and sold to the plaintiff in error or the person under whom he claims.

I propose to show that the legal effect of this tender was to deprive the Commissioners of all authority to sell.

Whether or not such was the legal effect of the tender depends upon what was the object and purpose of the sale.

If the object of the sale was merely to raise the unpaid tax, with interest and costs, then the previous payment or tender of the tax, interest and costs, would remove all cause for a sale, and therefore all authority for a sale. A sale under the act is clearly not to be had merely for the sake of having a sale—it is to be had to accomplish some object, and if that object be accomplished beforehand, there is no cause and no excuse for a sale.

What is the object of the sale authorized by section 7 of this act?

This again depends upon the construction to be given to the 4th section, which, as before stated, enacts, that unless the tax be paid within the sixty days, the title to the land shall thereupon become forfeited to the United States, and "*upon the sale hereinafter provided for, shall vest in the United States, or in the purchaser at said sale, in fee simple, free and discharged, &c.*"

In what sense is the land forfeited under this provision? What is the status of the property, as to title, after the lapse of the sixty days, without payment, and up to the time of sale? During this interval, to whom does the property belong, and what are the rights, both of the original owner and of the United States, in respect to it?

For the plaintiff in error it is contended, that the default of payment within the sixty days operates, *ipso facto*, to transfer to the United States the full and absolute title to the whole property—that the forfeiture intended by section 4 is such a forfeiture, that upon default of payment within the time, the property thereupon accrues immediately to the United States and becomes wholly lost to the original owner as a penalty or

punishment upon him for failing to pay, on or before the sixtieth day—and that the "sale hereinafter provided for" is only a proceeding in the nature of a proceeding *in rem*, to enforce the forfeiture and to perfect the inchoate title of the United States.

In other words, under the construction of the plaintiff in error, the sale is a device to get the land, and not to get the tax.

I maintain that no such forfeiture as that claimed by the plaintiff in error was intended by the act. If it were intended, I should maintain that such a forfeiture was beyond the power of Congress.

That Congress may impose a tax upon land, and may subject the land to the payment of the tax, nobody of course denies; but to lay a tax upon land, and subject the land to its payment, is one thing—to lay a tax upon land, and to take the whole land away, as a punishment upon the owner for not paying the tax by a given day, is quite another thing.

This latter is the proposition maintained by the counsel for the plaintiff in error. They claim that Congress, in adopting means for the collection of a direct tax, has the power to enact, that default in the payment of the tax within sixty days from the time it is laid, shall operate, *ipso facto*, to transfer the entire property upon which the tax is imposed, absolutely and irredeemably, to the United States.

A tax of twenty dollars is imposed upon a property worth twenty thousand dollars, and Congress has the power, say the counsel for the plaintiff, to declare, that the whole twenty thousand dollars shall immediately, absolutely and irredeemably become the property of the United States, if the twenty be not paid by a given day.

The argument for the plaintiff in error is, that Congress has all the powers in and about the collection of a United States tax that a State has in and about the collection of a State tax—that a State has power to forfeit lands as a means

the loss of the whole land by any means, but an additional charge of 50 per cent.—that, *eo nomine*, is declared the penalty. Congress having so declared in terms what the penalty shall be, must be supposed to have declared the *whole* penalty. And how absurd was it, to charge the land with 50 *per cent. of the tax* as a penalty, if *the loss of the whole land* was to be the penalty. Why say to the owner, unless you pay in sixty days your land shall be liable for half as much more, if the object was to take from him the *very land itself*. Why the trouble to impose the paltry 50 per cent., if the design was to appropriate, absolutely, the whole subject.

Second. The fact that the tax is made a *lien* on the land—is itself conclusive against the construction that the United States was to take *the land itself* if the tax was not paid, and as a consequence of the non-payment. Why declare the tax a *lien* on the land, if the intent was to *take the land* in case the tax was not paid. Declaring the tax a lien on the land evidences an intent to hold the land bound and liable for it, and negatives any purpose to claim and appropriate the land itself absolutely.

A lien on land as security for the payment of a claim, and an entire forfeiture of the land for its non-payment, are provisions inconsistent with each other—both cannot stand together—the presence of one excludes the other, and here there is express provision for the former.

Third. The act provides for *two* sales, namely, (1,) a sale of the land on which the tax remains unpaid, and *because* it remains unpaid, and (2) a sale of land which the United States has previously purchased at the *first* sale. (See section 9, *et seq.*) Mark the broad difference in the provisions respecting these two sales. Out of the proceeds of the *first* sale—the *tax sale proper*—the act claims nothing for the United States beyond *the tax, penalty, interest and costs.* The *surplus* proceeds at *this* sale are not required to be paid into the treasury. No provision for that can be found in the act anywhere. The act does not treat the *tax sale proper* as made

for the benefit of the United States beyond its claim for tax, penalty, interest and costs. To anything in excess of that, the United States asserts no demand.*

Quite otherwise is it with the *second* sales directed by section 9, *et seq.* In dealing with *these* sales, the act treats the property sold as absolutely the property of the United States and as sold for its benefit alone. The proceeds of *these* sales are claimed wholly for the United States, and are directed to be paid into the treasury of the United States. At *these* sales the United States is selling its own property—property which it bought at the tax sale, and of course is entitled to the entire proceeds. At the *tax* sale, the land is sold as the *property of the tax-payer* to satisfy a claim of the United States charged upon it. The second sale is a sale of *government property*, acquired by successful bidding at the tax sale.

Fourth. The United States can only acquire title to the forfeited lands by *bidding and bidding highest* at the tax sale. See sections 4 and 7.

Wholly repugnant is this to the theory of the plaintiff in error. If the loss of the land by the owner and the acquisition of it by the United States on default in payment of the tax within the sixty days was intended, it was simply absurd to make the United States compete for the land as a bidder at a public sale.

In case of forfeitures *in rem*, there is indeed usually a sale of the thing condemned, but the sale, in such cases, is the *result and consequence* of title—it is not a means of *acquiring* title by the United States, but a means of enjoying the title *already* acquired. At such sales the United States is not required to be a *successful bidder* to get title. The property is sold as already the property of the United States.

From these features in the act, I conclude that there is no loss of the property to the owner, as a penalty for non-pay-

* That the United States claims, out of the proceeds of the first sale, only the tax, interest and expenses. See Sect. 4, Act of March 3d, 1865, XIII Stat. at Large 502.

ment of the tax within the sixty days. After the lapse of the sixty days without payment, the only change in the status of the property is, that it then becomes liable to be sold for the payment of the tax, with interest and costs.

During the sixty days, the United States can only claim, and, in fact, does only claim the *tax*, and cannot even sell for *that*. After the sixty days, it can and does claim, both tax and interest, and may sell for the recovery of it, with costs, The United States asserts no claim upon, or interest in, the land beyond that; so that the provisions contained in the act respecting forfeiture and sale amount, at last, only to the usual provisions contained in all laws imposing a tax on land, namely, provisions for their sale as a means of collecting the amount imposed.

And this conclusion is confirmed by the further provision, allowing redemption after sale.

Why should the owner be allowed to have back his property on the day after the sale, by payment of the tax, with interest and costs, if the object of the sale was not to realize the tax, with interest and costs.

If, then, such be the whole and sole object of the sale, then the power to prevent a sale by previous payment of tax, interest and costs, as before stated, inevitably follows.

But section 7 of the original act was amended, (XII. Stat. at Large, 640,) and under the amended section, say counsel for plaintiff in error, a sale, after advertisement, may be prevented by payment of tax, interest and costs; but this payment, say they, can only be made by the owner in proper person: They concede that this is *sufficient* to prevent the sale, and they maintain that all this is *necessary* to prevent the sale.

I agree that this is *sufficient*, but I deny that all this is *necessary*. I agree that the payment of tax, interest and costs by the owner in proper person is sufficient to prevent the sale, and I maintain that payment of the tax, interest and costs,

without the personal appearance of the owner, is also sufficient.

If the maker of a note appear to the payee in proper person, and pay him the money, that discharges the note. If he pay the money, without appearing in person to the payee, that also discharges the note just as fully.

So here, the personal appearance of the owner and payment of the tax, &c., prevents the sale. The payment of the tax, &c., without personal appearance, prevents the sale. The efficacy lies in the payment of the money—*wholly* in that and not at all in the personal appearance.

Counsel for plaintiff assume that the amended act has declared it *necessary* that the owner should pay the tax, interest and costs, *in proper person*, to prevent a sale after advertisement.

The amended act does not make this necessary.

Neither the original nor the amended section expressly declares by what means a sale once advertised may be prevented—or that it may be prevented by any means.

Both sections leave this altogether to inference, and there is nothing in either section to support the inference that payment by the owner in person would prevent a sale, unless it be conceded that the object of the sale is what I am claiming it to be. A critical examination of the amended section will show that it does not, *in terms*, give to the payment by the owner in person, the effect of preventing a sale—if it has that effect, (as I concede it has,) it derives it from something else than the *language* of the section—and it can derive it from no other source, except from the fact that it accomplishes the object of the sale.

On the theory of the plaintiff in error, that the sale is merely a proceeding to enforce a forfeiture and vest the title of the property in the United States, if *that* be the object of the sale, there is nothing in the personal appearance of the owner and his payment of the tax to satisfy *that* object, and

therefore nothing in it which, by implication, should prevent the sale.

And here the plaintiff's theory of the nature of the forfeiture may be subjected to a fair test.

Suppose, after a sale is advertised, the owner appears in person and pays the tax, and the sale is thus prevented—*what then becomes of the land?*

According to the plaintiff's counsel, the owner, on default of payment, was divested of all title—thenceforward, *till sale*, the property became and continued, wholly and absolutely, the property of the United States;—when, therefore, the owner comes forward in person, pays the tax, and *stops the sale*, he simply thereby perpetuates his own loss—pays his tax, with interest and costs, and loses his land besides!

Stopping the sale does not change the situation of the title; that, according to the plaintiff's counsel, being in the United States, must still continue to remain there.

Summing up the foregoing comments on the amended section, they amount, in brief, to this:

The amended, like the original section, says nothing as to the manner of preventing a sale once advertised. It leaves the subject just where it stands under the original act. It does not say what shall be necessary or what shall be sufficient, to prevent the sale. If, therefore, under the original act the sale might be prevented by payment of tax, interest and costs, in the same manner it might be prevented under the amended act.

But suppose the act had declared, in terms, that, to prevent a sale after advertisement, payment should be made by the owner in proper person. What would have been the legal effect of that part of it requiring the personal appearance? Would it have had any legal effect? Would not the payment of the money alone have been a full satisfaction of the law? Certainly it would. If the law had required that he should pay with his right hand, would not payment with his left have been sufficient? Undoubtedly it would, because, in

either case, the essence of the requirement is the payment of the money—the doing of the thing required, and not the manner of doing it, is what the law deems material.

If, besides the payment of the money, some other act was to be done for which personal presence was indispensable, the case would be different—but where the personal appearance is required to do an act, which can be done just as effectually without personal appearance, then the personal appearance is immaterial.

But, again, suppose the law had declared that the owner should appear in proper person and pay—and suppose the personal appearance a material part of the requirement, who is an "owner" within the meaning of the term as here employed?

See Dubois *vs.* Hepburn, 10 Pet., page 1, for definition by United States Supreme Court of an "owner" for the purpose of redemption, after a tax sale.

"Any person who has any interest in the land * * * * is the owner thereof for the purpose of redemption—any right of entry upon it, to its possession or enjoyment or any part of it, which can be deemed an estate in it, makes the person the owner for purpose of redemption."

Such is the Supreme Court's definition of an owner, for the purposes of a redemption, *after* sale and after some rights have accrued to a purchaser. Certainly the defifiition will not be narrower for an "owner" *before* a sale and for the purpose of preventing a sale, before any rights of third parties have accrued.

Under this definition, then, the "owner" did appear and make the tender in proper person, the tender having been made by the tenant in possession—and thus the law was fully satisfied, even on the most extreme hypothesis as to its requirements.

I sum up the whole of this branch of the argument as follows:—The act of June 7, '62, provides for no forfeiture *in rem* or common law forfeiture of the land.

Such forfeitures for default in the payment of a direct tax on land are beyond the power of Congress; if they were not, they are clearly not designed or intended by the act.

The sole object of the "sale hereinafter provided for" is to recover the tax, with interest and costs—and such being its object, the sale may always be prevented by paying beforehand the tax, interest and costs. This payment need not be made by the owner in person. The amended act does not require it—if the amended act did require it, the requirement in respect to the personal appearance would have no legal effect—and if the amended act did require it and the requirement were material, there *was* personal appearance of the owner.

It is to be observed, that there was tender of payment and refusal of the Commissioners to receive it. I assume that tender of payment is equivalent to actual payment, so far as either has any bearing on the validity of the sale.

See Hepburn *vs.* Auld, 1 Cranch 330, if authority is necessary, that tender and refusal are equivalent to performance.

The unlawful refusal of the Commissioners to accept the tax when tendered, cannot be made the foundation of a valid sale.

I conclude this branch of the argument by calling attention to the last proviso of section 7—as confirmatory of the conclusions stated above.

This proviso specifies three grounds on which the Commissioners' certificate of sale may be impeached, as evidence of the regularity and validity of the sale:—one of which is, proof of *payment previous to sale.* Payment *previous to sale,* it is to be observed, is the language—not payment *within the sixty days.*

2. The sale by the Commissioners in this case was void, because they sold the whole land, when the tax, &c., might have been realized by the sale of a part, and that a very small part.

The act directs a sale of the land, and is silent as to the quantity—it does not say the "whole" land.

"Where the statute was silent as to the quantity which might be offered and sold to pay taxes, the Supreme Court of Indiana held, that, upon general principles, a sale of a greater quantity than was necessary to satisfy the tax * * * * was illegal and void." Blackwell, pp. 287, 288, citing 2 Blackford, 421.

If this be the law, then the Commissioners sold, in these cases, *without any authority to sell*:—They exceeded their authority, which was equivalent to acting without authority. Blackwell, p. 437, *et seq.* Chapter *Excess or Abuse of Authority.*

But the plaintiff in error shelters himself here, under the effect which is given by the act to the certificate of sale.

The direct enactment on this point is, "which said certificate shall be received in all Courts and places, as *prima facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same."

This enactment simply shifts the burdens of proof, but does not in any degree dispense with that strictness in the execution of the power which has always been held necessary to a good title under a tax sale.

Any irregularity in the execution of the power has the same effect under this enactment that it always had—proof of it is cast on him who contests the tax title—that is all. Proof of the absence of an authority to sell will destroy the tax title, notwithstanding *this* enactment.

But the direct enactment respecting the force of the certificate as evidence, is qualified by a proviso, the last proviso in section 7, "that the certificate * * * shall only be affected as evidence of the regularity and validity of the sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed," &c.

(The province of a proviso to a statute is not to enlarge

the enacting clause; it can only restrain, qualify, or explain it. 1 Scammon 259, 4 Scammon 352, 19 Ver. 129.)

The plaintiff in error claims that this proviso makes the certificate conclusive evidence of a perfect title, except against proof that the land was not subject to taxes, or that the taxes had been paid, or that the land had been redeemed.

In the absence of any enactment specially on the point, two things are necessary to make the title acquired at a tax sale good, viz: 1st. The Commissioners must have authority to sell; and 2d. The sale must be conducted strictly according to the mode prescribed.

On the claim of the plaintiff in error as to the effect of this proviso, it would result, that however unauthorized, for other causes, the action of the Commissioners might be in making a sale, the owner would be prevented from showing this absence of authority, unless it grew out of the fact, that the land was not subject to taxes, or that the taxes had been paid. The Commissioners might lack authority to sell for other than these two reasons. Suppose, for example, they were to sell at the expiration of ten days, instead of waiting for the expiration of the sixty—that would clearly be a sale without authority. Yet the title acquired at it would, nevertheless, be good, under the certificate, if the certificate has the effect claimed, and thus a sale by a public officer, having no authority to sell, would carry a perfect title.

Such legislation, in the language of Judge Caton, (Curry *vs.* Hinman, cited in Blackwell, 81,) would be "nothing less than a moral fraud"—"the monstrous injustice of such a law is too glaring to admit of that construction, if one more just and reasonable can be given to it."

That the statute might provide, that an irregularity in the mode of conducting the sale should not vitiate the title, may be very readily admitted—but that the statute should further provide, that the absence of authority to sell should not vitiate it, is simply monstrous.

See Blackwell, page 79 *et seq.* Chap. "*Of the onus probandi,*"

for collection of decisions on statutes giving certain conclusive effects to tax deeds, &c.

These decisions clearly indicate the opinions of the several Courts by which they are made, that any attempt to make the tax deed conclusive evidence of the *authority to sell* would be vain. To hold otherwise would be to hold, that the legislature may take the property of A and give it to B.

These decisions also show on what slight things the Courts will seize to construe a statute as not intended to have such effect.

Thus, where it had been enacted that a tax deed should be conclusive evidence of the "*regularity and legality of the sale*" it was held, (Garret *vs.* Wiggins, 1 Scammon,) that this had reference to the mode of conducting, and not to the authority to make the sale.

A "regular and legal" sale under a tax law, does not therefore necessarily import a good title, according to the spirit of these decisions—because a "regular and legal" sale does not necessarily imply an authority to sell—and without that, a "regular and legal" sale carries no title.

In the light of these decisions, I ask special attention to the phraseology employed in this act.

The direct enactment declares, that the certificate shall be *prima facie* evidence of the "regularity and validity of the sale and of the title of the purchaser." The proviso speaks of the certificate, as evidence of the "regularity and validity of the sale," omitting the words, "and of the title of the purchaser."

The employment of these last words in the direct enactment, and their omission in the proviso, is not an immaterial circumstance.

If "regularity and validity" in the sale necessarily implied a perfect title in the purchaser, then the words "and of the title of the purchaser" were pure tautology. But this is not to be presumed, under any circumstances, and especially not,

where such a presumption would make the proviso productive of the consequences above stated.

Here, then, it is implied that there may be "regularity and validity" of sale, and yet not a title in the purchaser; and this can only be explained by construing the expression "regularity and validity" to have reference to the mode of conducting the sale—that it does not include the authority to sell, which is, also, requisite to a perfect title. Thus the effect of the proviso is, not to shut out proof of the absence of authority, from whatever circumstance such want of authority may result—but only to exclude evidence of irregularity in conducting the sale.

If the position of the plaintiff in error be a true one, then the Commissioners might fill up and sign a certificate of sale —and, without advertising a sale—or without having a sale —or without even laying the tax, by the mere issue of this certificate might strip a man of his property forever.

But all difficulty—if any—arising under this proviso, is removed by the Joint Resolution of February 25, 1867, (XIV. Stat. at Large, 568,) section 6:—repealing certain previous amendments of the direct tax law, and declaring, that "certificates of sale shall be received, in all Courts and places, as *prima facie* evidence of the regularity and validity of said sale, and of the title of purchaser or purchasers under the same, as provided in section 7 of the act * * * approved June 7, 1862."

This declaration, as to the legal effect of the certificate, operates to repeal all previous inconsistent declarations on that subject, and thus repeals the proviso* now under consideration.

Summing up this branch of the argument, I submit that the Commissioners (supposing they had any authority to sell)

*Note.—The act of June 7, '62, with its amendments, was before the United States Circuit Court for the Eastern District of Arkansas, in case of Washington L. Schenck vs. Gordon N. Peay et al. An abstract of the points decided is reported in "Internal Revenue Record, August 14th, 1869, Vol. X, p. 54."

had authority to sell only so much as would pay the tax with interest and costs. This was the limit of their authority, as much so as if that limit had been prescribed expressly. They had no authority to sell the whole property. In selling the whole property they sold without authority—this absence of authority rendered their sale void, and we are not precluded from showing this want of authority, by any effect which the act gives to the certificate as evidence.

AS TO THE REDEMPTION OF THE PROPERTY.

The property was redeemed according to the provisions of the act.

The redemption took place under the second proviso of section 7, viz: "If the owner of said lots of ground shall be a minor * * * * or a person under a legal disability, the guardian, trustee or other person having charge of the person or estate of such person, may redeem the same at any time within two years after the sale thereof, and in the manner above provided and with like effect.

Hunter, being a minor at the time of sale, was entitled to the benefit of this proviso.

The manner of redeeming is prescribed in the first proviso of section 7, as follows, viz:—the owner is to appear before the Commissioners—take an oath to support the Constitution of the United States—and pay the tax, penalty, interest and costs.

All this was literally done by Hunter within two years from the sale.

That Hunter was an "owner" of the property, for the purposes of redemption, is submitted as clear, under the decisions referred to.

His title was derived under the will which devised the place to B. W. H. (the father) until A. H. (son and defendant in error) should be twenty-one—and then to A. H. (the son) in fee. Should the son die before twenty-one, then to the father in fee.

The son wanted only four months of being twenty-one when the land was sold.

His estate was a contingent remainder in fee, to vest in possession on his attaining twenty-one. That such a contingent remainder is an "estate"—a subject of alienation, voluntary or involuntary—see 2 Washburne's Real Prop., marginal page 237, and any elementary work on real estate. To all human calculations, the son had the chief interest in seeing that the land was not lost. The father had a *certain* estate in it, for four months only, and the son, if then alive, was to have it forever, absolutely.

A state of facts, easily supposable in this case, will fairly illustrate the positions taken by counsel for plaintiff. It is understood that they deny Hunter (the son) to have been an "owner" of the land, for the purpose of redemption, because the whole fee was not absolutely in him at the date of the sale.

Suppose he had come of age on the day after the sale.

Suppose the sixty days had passed without payment of the tax, nobody knowing that any tax had been laid, and the land is advertised for sale.

B. W. H., the father, is physically unable to appear before the Commissioners and pay the tax, interest, costs, in person, and A. H., the son, is not allowed to pay, because, they say, he is not the "owner." In that case, both father and son would both be bound to stand still and see an estate worth $50,000 (as this, in fact, is) sold and hopelessly lost to them, because of the non-payment of a $50 tax, and that, too, when both are ready to pay it, and actually begging the tax-collectors to receive it!

Hopelessly lost, I say, because it cannot be redeemed after the sale—not by the son, because he was not an "owner" at the time of the sale; and not by the father, because, on the supposition, he has no longer any interest to redeem.

The person who applied to redeem, in this case, being an "owner" within the meaning of the statute, and having made

application within the time prescribed, and having complied, literally, with the terms of redemption as set out in the first proviso of section 7, the property was redeemed, and the title of the tax purchasers, conceding that it had, up to that time, been valid, was then and thereupon extinguished.

It is objected, however, by the counsel for plaintif the act of March 3, 1865, imposed additional conditi redemption, (see section 7 of that act, first proviso,) an the applicants did not perform these conditions. T true, but the applicants were not bound to perform th tional conditions imposed by the act of 3d of March.

The additional condition of redemption imposed by t is an oath, by the applicant, that "he has not taken pa the insurgents in the present rebellion, or in any wa them aid or comfort," and proof, satisfactory to the C sioners, that the "said oath is true."

The act of March 3d, containing the above provisi passed *after* the tax sale in these cases, and *before* the allowed for redemption, by the former law, had expire

To treat the act of March 3d as applicable to these would be to make it retro-active in its operation.

Such operation is not to be taken as intended, un express terms of the act make it so, and these terms a and unequivocal. Sedgwick on Con. and Stat. Law and other pages referred to in index, and Blackwell 4

The *first* section of the act is, in express and une terms, made retro-active—the absence of such term seventh section would imply, positively, a different int reference to that.

Again, *after* sale and *before* the expiration of the period of redemption, to impose a *new* condition of redemption, presupposes the right and power to take away the privilege of redemption altogether.

The Government says: if you fail to pay the tax, your land shall be sold, but not irredeemably; you may buy it back again, within two years, by paying the tax, with interest

The son wanted only four months of being twenty-one when the land was sold.

His estate was a contingent remainder in fee, to vest in possession on his attaining twenty-one. That such a contingent remainder is an "estate"—a subject of alienation, voluntary or involuntary—see 2 Washburne's Real Prop., marginal page 237, and any elementary work on real estate. To all human calculations, the son had the chief interest in seeing that the land was not lost. The father had a *certain* estate in it, for four months only, and the son, if then alive, was to have it forever, absolutely.

A state of facts, easily supposable in this case, will fairly illustrate the positions taken by counsel for plaintiff. It is understood that they deny Hunter (the son) to have been an "owner" of the land, for the purpose of redemption, because the whole fee was not absolutely in him at the date of the sale.

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application within the time prescribed, and having complied, literally, with the terms of redemption as set out in the first proviso of section 7, the property was redeemed, and the title of the tax purchasers, conceding that it had, up to that time, been valid, was then and thereupon extinguished.

It is objected, however, by the counsel for plaintiff, that the act of March 3, 1865, imposed additional conditions of redemption, (see section 7 of that act, first proviso,) and that the applicants did not perform these conditions. That is true, but the applicants were not bound to perform the additional conditions imposed by the act of 3d of March.

The additional condition of redemption imposed by this act is an oath, by the applicant, that "he has not taken part with the insurgents in the present rebellion, or in any way given them aid or comfort," and proof, satisfactory to the Commissioners, that the "said oath is true."

The act of March 3d, containing the above provision, was passed *after* the tax sale in these cases, and *before* the period allowed for redemption, by the former law, had expired.

To treat the act of March 3d as applicable to these cases, would be to make it retro-active in its operation.

Such operation is not to be taken as intended, unless the express terms of the act make it so, and these terms are clear and unequivocal. Sedgwick on Con. and Stat. Law 194–5, and other pages referred to in index, and Blackwell 480.

The *first* section of the act is, in express and unequivocal terms, made retro-active—the absence of such terms in the seventh section would imply, positively, a different intent with reference to that.

Again, *after* sale and *before* the expiration of the period of redemption, to impose a *new* condition of redemption, presupposes the right and power to take away the privilege of redemption altogether.

The Government says: if you fail to pay the tax, your land shall be sold, but not irredeemably; you may buy it back again, within two years, by paying the tax, with interest

and costs. Relying on this, the citizen, through inadvertence or other causes, suffers his land to be sold, knowingly—having the pledge of the Government that he may afterwards redeem it, by payment of a trifling amount; but immediately after the sale, and before the time of redemption has expired, the Government, by a fresh act, says he shall not redeem at all, or what is the same thing, imposes new conditions of redemption, not existing at the time of the sale, which he is unable to perform.

This would be a breach of faith, not to be imputed to any legislative body, if their act would possibly admit of any other construction. The first proviso of section 7 of the act of 1865, is made fully operative by construing it as *intended* to apply, only, to those sales made after its passage.

The right of redemption under the act of Congress was a vested right—it was property, and as such, guaranteed to the owner against loss except by due process of law. It was not a gratuitous privilege to be taken away at any time—it was an inseperable incident to the sale. If, after the period of redemption had expired, a *further* time had been allowed for redemption, such a privilege would have been gratuitous and might have been taken away at any time, for this would not have been an incident to the sale. But the right to redeem, attached to the sale, was property, and to deprive one of it unless he made oath that he had not committed a crime, would be to punish him with loss of property without conviction or trial.

Congress or a State Legislature, in providing for the sale of delinquent lands, may not be bound to attach to the sale a privilege of redemption—but where that privilege has been attached to the sale, and the sale has been accordingly made, the power to annul the privilege without, at the same time, annuling the sale, is, at the least, doubtful.

On the foregoing, I submit, that the first proviso of section 7 of the act of '65 (XIII. Statutes at Large 502) was not *intended* to affect rights of redemption *then* existing, that if so

intended, there was no *power*, after a sale, to attach to them the performance of a new condition—and that if there was power to attach *any* new condition, there was none to attach such a condition as the one thereby prescribed.

But if all this were not so, the pardon of Hunter rendered the new condition inoperative as to him.

The first of the series of acts coming under review, in this case, is the act of August 5th, 1861—"To provide increased revenue from imports, &c."

By that act, a direct tax is imposed upon the United States, to be assessed and laid upon real estate. Very careful and detailed provision is made for assessing and collecting the tax. Every line shows the special desire of Congress to collect the tax with the least possible hardship to the citizen.

Next to the collection of the tax, the design of Congress to guard the citizen against oppression, is most conspicuous.

The act of June 7, '62, and the acts amendatory of that act, are really part and parcel of the act of August, '61—as much so as if they were actually incorporated in it. They are auxiliary to the main purpose of that act—they were passed in the prosecution of the same design, viz: the collection of the tax, and they are to be construed and administered so as to make them effective for that purpose, and in the evident spirit of the main act.

The counsel for the plaintiff, whilst disclaiming it in terms, nevertheless proceed, in fact, upon the theory that these acts, though nominally intended for the collection of a tax, were really intended to confiscase the property of disloyal citizens —that under color of collecting a tax, the main purpose was to punish for disloyalty—and they, therefore, construe and apply the acts in such way as to make them most effective as penal enactments. (On this point see Blackwell pp. 29, 30.)